

EXHIBIT 46

2006 Parole Hearing Transcript

SUBSEQUENT PAROLE CONSIDERATION HEARING
STATE OF CALIFORNIA
BOARD OF PAROLE HEARINGS

In the matter of the Life)
Term Parole Consideration)
Hearing of:)

CDC Number B-89549

MARK TITCH)
_____))
_____)

**INMATE
COPY**

R.J. DONOVAN CORRECTIONAL FACILITY

SAN DIEGO, CALIFORNIA

JULY 19, 2006

PANEL PRESENT:

Mr. James Davis, Presiding Commissioner
Mr. Alejandro Armenta, Deputy Commissioner

OTHERS PRESENT:

Mr. Mark Titch, Inmate
Mr. Daniel Coryn, Attorney for Inmate
Mr. Tony Ferrentino, Deputy District Attorney
Correctional Officer Unidentified

CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____	No	See Review of Hearing
_____	Yes	Transcript Memorandum

Stacy Wegner, Peters Shorthand Reporting

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P R O C E E D I N G S

1
2 **PRESIDING COMMISSIONER DAVIS:** This is a
3 Subsequent Parole Consideration hearing for Mark
4 Titch, CDC number B-89549. Today's date is July
5 19th, 2006. We're located at R.J. Donovan
6 Correctional Facility. The inmate was received
7 on January 18th, 1978, from Orange County. The
8 life term began on January 18th, 1978, with a
9 minimum eligible parole date of February 4th,
10 1984. The controlling offense for which the
11 inmate is committed is murder first, case number
12 C-37693. Count 13, 187 first with additional
13 charges of robbery, Penal Code Section 211, same
14 county, same case number, counts two, four, six,
15 seven, and nine; burglary, Penal Code Section
16 459, same county, same case number, counts 10,
17 11 and 15; kidnap, Penal Code Section 209, same
18 county, same case number, count 12; murder,
19 Penal Code Section 187, same county, same case
20 number, count 16; and assault with a deadly
21 weapon, Penal Code Section 245(b), San Diego,
22 case number CR-42845, and that is count two.
23 This hearing -- the inmate did receive a term of
24 life. This hearing is being tape record, and
25 for the purposes of voice identification, we
26 will each state our first and last name,
27 spelling your last name. When it comes to you,

1 Mr. Titch, if you would also give us your CDC
2 number, please, sir. So I will start and move
3 to my left. I'm James Davis, D-A-V-I-S,
4 Commissioner.

5 **DEPUTY COMMISSIONER ARMENTA:** Alejandro
6 Armenta, A-R-M-E-N-T-A, Deputy Commissioner.

7 **INMATE TITCH:** I'm Inmate Titch, T-I-T-C-H.
8 Prison number is B-89549.

9 **PRESIDING COMMISSIONER DAVIS:** And your
10 first name also, please?

11 **INMATE TITCH:** Mark.

12 **PRESIDING COMMISSIONER DAVIS:** Mark. Thank
13 you.

14 **ATTORNEY CORYN:** Daniel Coryn, C-O-R-Y-N,
15 attorney for Mr. Titch.

16 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** Tony
17 Ferrentino, F-E-R-R-E-N-T-I-N-O, Deputy District
18 Attorney of Orange County.

19 **PRESIDING COMMISSIONER DAVIS:** Thank you.
20 Let the record also reflect that we are joined
21 by a correctional officer today who is here for
22 security purposes only and will not be actively
23 participating in this hearing. Before we begin,
24 Mr. Titch, if you'd also -- excuse me, in front
25 of you is a laminated piece of paper containing
26 the American's with Disabilities Act statement.
27 Could you please read that aloud, sir?

1 **INMATE TITCH:**

2 The American's with Disabilities Act,
3 ADA, is a law to help people with
4 disabilities. Disabilities are
5 problems that make it harder for some
6 people to see, hear, breathe, talk,
7 walk, learn, think, work, or take care
8 of themselves than it is for others.
9 Nobody can be kept out of public places
10 or activities because of a disability.
11 If you have a disability, you have the
12 right to ask for help to get ready for
13 your BPT hearing, get to the hearing,
14 talk, read forms and papers and
15 understand the hearing process. BPT
16 will look at what you ask for to make
17 sure that you have a disability that is
18 covered by the ADA and that you have
19 asked for the right kind of help. If
20 you do not get help, or if you don't
21 think you got the kind of help you
22 need, ask for a BPT 1074 Grievance
23 Form. You can also get help to fill it
24 out.

25 **PRESIDING COMMISSIONER DAVIS:** All right.
26 Thank you. And our records indicate that
27 together with staff from the institution on

1 March 2nd, 2006, you reviewed and signed a BPT
2 Form 1073 indicating that you do not have any
3 disabilities that would qualify under the
4 American's with Disabilities Act. Is that
5 correct, sir?

6 **INMATE TITCH:** That's correct.

7 **PRESIDING COMMISSIONER DAVIS:** All right.
8 So you were able to read that today without
9 glasses?

10 **INMATE TITCH:** Yes.

11 **PRESIDING COMMISSIONER DAVIS:** Do you
12 normally wear glasses?

13 **INMATE TITCH:** No, sir.

14 **PRESIDING COMMISSIONER DAVIS:** Good for
15 you. You're able to hear me all right?

16 **INMATE TITCH:** Yes, sir.

17 **PRESIDING COMMISSIONER DAVIS:** And you came
18 here today. You walked here under your steam,
19 you walked here -- you seem fit and healthy and
20 ready to go?

21 **INMATE TITCH:** Yes, sir.

22 **PRESIDING COMMISSIONER DAVIS:** All right.
23 You're not part of any mental health programs?

24 **INMATE TITCH:** No, sir.

25 **PRESIDING COMMISSIONER DAVIS:** All right.
26 Is there any reason that you can think of that
27 you would not be able to actively participate in

1 this hearing today?

2 **INMATE TITCH:** None.

3 **PRESIDING COMMISSIONER DAVIS:** Very well.
4 Counsel, you're satisfied with that as well?

5 **ATTORNEY CORYN:** Yes, I am. This hearing
6 is being conducted pursuant to Penal Code
7 Sections 3041 and 3042 and the rules and
8 regulations of the Board of Prison Terms
9 governing parole consideration hearings for life
10 inmates. The purpose of today's hearing is to
11 once again consider the number and the nature of
12 the crimes for which you were committed, your
13 prior criminal and social history, and your
14 behavior and programming since your commitment.
15 We've had the opportunity to review your Central
16 File and your prior transcripts, and you'll be
17 given an opportunity to correct or clarify the
18 record as we proceed. We will reach a decision
19 today and inform of whether or not we find you
20 suitable for parole and the reasons for that
21 decision. If you are found suitable for parole,
22 the length of your confinement will be explained
23 to you. Nothing that happens in today's hearing
24 will change the findings of the Court. The
25 Panel is not here to retry your case. We're
26 here for the sole purpose of determining your
27 suitability for parole. Do you understand that,

1 sir?

2 **INMATE TITCH:** Yes, sir.

3 **PRESIDING COMMISSIONER DAVIS:** All right.

4 This hearing will be conducted in two phases.

5 First, I will discuss with you the crimes for
6 which you were committed, as well as your prior
7 criminal and social history. Then Commissioner
8 Armenta will then discuss with you your progress
9 since your commitment, your counselor's report,
10 your psychological evaluation, parole plans, and
11 any letters of support or opposition as they may
12 exist. Once that's concluded, the
13 Commissioners, the District Attorney, and then
14 your attorney will have an opportunity to ask
15 you questions. Questions that come from the
16 District Attorney will be asked through the
17 Chair, and then you will respond back to the
18 Panel with your answer. After that, the
19 District Attorney and then your attorney will
20 then be given an opportunity for a final closing
21 statement, followed by your statement, which
22 should be focused on why you believe that you
23 are suitable for parole. California Code of
24 Regulations states that regardless of time
25 served, a life inmate shall be found unsuitable
26 for and denied parole, if in the judgment of the
27 Panel the inmate would pose an unreasonable risk

1 of danger to society if released from prison.
2 You have certain rights. Those rights include
3 the right to a timely notice of this hearing,
4 the right to review your Central File, and the
5 right to present relevant documents. Counsel,
6 are you satisfied that your client's rights have
7 been met to date?

8 **ATTORNEY CORYN:** Yes.

9 **PRESIDING COMMISSIONER DAVIS:** You have an
10 additional right, and that is to be heard by an
11 impartial Panel. Now, you've heard Commissioner
12 Armenta and I introduce ourselves today. Is
13 there any reason to believe that we would not be
14 impartial?

15 **INMATE TITCH:** I've never had any -- I've
16 never gone before any of you. I think the law
17 says that I'm supposed to have one of the guys
18 from my prior hearing?

19 **PRESIDING COMMISSIONER DAVIS:** No.

20 **INMATE TITCH:** No?

21 **PRESIDING COMMISSIONER DAVIS:** No.

22 **INMATE TITCH:** It doesn't say that, okay.
23 Well, maybe that's my mistake. But no, I don't
24 have any problems.

25 **PRESIDING COMMISSIONER DAVIS:** Thank you.

26 **INMATE TITCH:** Yes, sir.

27 **PRESIDING COMMISSIONER DAVIS:** You will

1 receive a written copy of our tentative decision
2 today. That decision becomes effective within
3 120 days. A copy of the decision and a copy of
4 the transcript will be sent to you. You are not
5 required to admit to your offense or discuss
6 your offense. However, this Panel does accept
7 the findings of the Court to be true. You
8 understand that, sir?

9 **INMATE TITCH:** Yes, sir.

10 **PRESIDING COMMISSIONER DAVIS:** The Board --

11 **ATTORNEY CORYN:** Can I interrupt? Mr.
12 Titch will be exercising that right.

13 **PRESIDING COMMISSIONER DAVIS:** Okay. That
14 will be fine. And we'll clarify that in a
15 moment, but I appreciate that. Thank you.

16 **ATTORNEY CORYN:** Yes.

17 **PRESIDING COMMISSIONER DAVIS:** The Board
18 has eliminated its appeal process. If you
19 disagree with anything in today's hearing, you
20 have the right to go directly to court with your
21 complaint. Commissioner Armenta, are we going
22 to be dealing with anything from a confidential
23 file today?

24 **DEPUTY COMMISSIONER ARMENTA:** We are not.

25 **PRESIDING COMMISSIONER DAVIS:** All right.
26 Thank you. I'm going to pass a checklist of
27 documents to both counsel. If you would please

1 take a look at that and make sure that we're all
2 operating off the same list of documents.

3 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** I
4 have all the documents.

5 **PRESIDING COMMISSIONER DAVIS:** All right.
6 Thank you.

7 **ATTORNEY CORYN:** I have all the documents
8 as well.

9 **PRESIDING COMMISSIONER DAVIS:** Thank you.

10 **ATTORNEY CORYN:** Additionally, I have a
11 packet here that is a folder with an index
12 prepared by Mr. Titch that has tabs, and you can
13 see how they relate to job offers.

14 **DEPUTY COMMISSIONER ARMENTA:** We have this
15 one?

16 **INMATE TITCH:** Yes. It's -- yeah, that's
17 the more developed version of that.

18 **ATTORNEY CORYN:** Okay.

19 **INMATE TITCH:** That was the binder that I
20 told you that was going to be in here.

21 **ATTORNEY CORYN:** All right. Then I don't
22 need to submit it --

23 **INMATE TITCH:** Yeah.

24 **ATTORNEY CORYN:** -- if the Board has one
25 then.

26 **PRESIDING COMMISSIONER DAVIS:** All right.
27 Then they're the same document then?

1 **INMATE TITCH:** Yes.

2 **PRESIDING COMMISSIONER DAVIS:** All right.

3 Very good. We appreciate you -- I haven't had a
4 chance to look at it, but we will review it at
5 the appropriate time, and we do appreciate you
6 preparing that. It --

7 **DEPUTY COMMISSIONER ARMENTA:** It's very
8 impressive.

9 **PRESIDING COMMISSIONER DAVIS:** It's very
10 good.

11 **INMATE TITCH:** Thank you.

12 **PRESIDING COMMISSIONER DAVIS:** All right.
13 So the list of documents will be marked Exhibit
14 One. And anything aside from that document,
15 Counsel that you would like for the Panel to
16 consider today? Any additional documents?

17 **ATTORNEY CORYN:** No. I have submitted a
18 June 29th letter, which I believe the
19 Commissioner also has.

20 **PRESIDING COMMISSIONER DAVIS:** I believe
21 that was in our package.

22 **ATTORNEY CORYN:** Okay. Thank you.

23 **PRESIDING COMMISSIONER DAVIS:** It's in
24 here, I believe.

25 **DEPUTY COMMISSIONER ARMENTA:** Let me look.

26 **PRESIDING COMMISSIONER DAVIS:** All right.
27 Anything additional, Counsel? Any additional

1 documents, nothing else?

2 **ATTORNEY CORYN:** No.

3 **PRESIDING COMMISSIONER DAVIS:** Nothing else
4 from the prosecution side, all right. And
5 preliminary objections, Counsel, anything?

6 **ATTORNEY CORYN:** No objections.

7 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** No
8 objections.

9 **PRESIDING COMMISSIONER DAVIS:** And can I
10 assume from your earlier statement that your
11 client will not be speaking about the instant
12 offense?

13 **ATTORNEY CORYN:** That's correct. He will
14 not be speaking about the offense. He'll be
15 exercising his right to rely on the state of the
16 record, as he stated previously. He does accept
17 responsibility for the offenses. And he will
18 also exercise his right not to talk about his
19 prior social or criminal history.

20 **PRESIDING COMMISSIONER DAVIS:** All right.
21 Will he be speaking to us on any matters?

22 **ATTORNEY CORYN:** Yes, he'll be answering
23 questions pertaining to post-conviction factors,
24 the psychiatric report and parole plans.

25 **PRESIDING COMMISSIONER DAVIS:** All right.
26 For all matters that you will be speaking to us,
27 then I'll have you raise your right hand, and

1 I'll swear you in at this point. Do you
2 solemnly swear or affirm that the testimony you
3 are about to give at this hearing will be the
4 truth, the whole truth, and nothing but the
5 truth?

6 **INMATE TITCH:** I do.

7 **PRESIDING COMMISSIONER DAVIS:** All right.
8 Absent objection, I'll incorporate by reference
9 the probation officer's report pages two through
10 five, and refer to the board report dated July
11 2006 for -- excuse me, on page one, starting on
12 the second paragraph under summary of crime.
13 The offense summary taken from the cumulative
14 case summary dated 3/2/78 and the probation
15 officer's report dated 3/27/78, controlling
16 accounts, 12 kidnap for robbery/use of a
17 firearm, Penal Code Section 209/12022.5, and
18 count 13, murder, Penal Code Section 187.

19 On January 21st, 1977, a motorcyclist
20 riding through a vacant field in the
21 city of Orange reported that he had
22 observed a female Caucasian subject
23 lying on a knoll of the hill. Police
24 responded and found the deceased, later
25 identified as victim Laura Ann
26 Sthouthton, S-T-H-O-U-T-H-T-O-N, 21
27 years old. The coroner's investigation

1 set the body in the upright position,
2 and it was noted in her right hand she
3 was clutching a rosary against her
4 chest. Additionally, investigators
5 noticed that the victim sustained two
6 possible gunshot wounds in the mouth
7 area and one gunshot wound in the
8 shoulder area. Police discovered a 22-
9 caliber bullet lying on a blanket next
10 to the victim's left shoulder.
11 Investigator indicated that there did
12 not appear to be a struggle in the
13 area.

14 Count 16, Penal Code Section 187, murder
15 first.

16 On January 29th, 1977, at approximately
17 3:56 a.m. Titch and Thomas
18 (codefendant) followed Aubery, A-U-B-E-
19 R-Y, Duncan, D-U-N-C-A-N, home from
20 work. Titch stopped a car he was
21 driving in front of the victim's home.
22 As Aubery Duncan went to the front door
23 to unlock it, Thomas, who was the
24 passenger of the car, shot Duncan can
25 several times with a 22-caliber rifle.
26 Nadine (phonetic) Duncan, D-U-N-C-A-N,
27 and her daughter Denise heard the loud

1 noise and went to the front door. As
2 Nadine Duncan opened the door and
3 stepped out on to the porch seeing her
4 husband dead, she was shot twice with a
5 22-caliber rifle and fell to the porch.
6 Her daughter Denise was shot three
7 times, unconscious, and subsequently
8 died at the hospital. Nadine Duncan
9 was shot by Thomas with a shotgun
10 before he ran out of ammunition for the
11 22-caliber rifle. She crawled over the
12 body of her daughter to get to the
13 phone to call the police.

14 Under Item B, multiple crime, count two,
15 Penal Code Section 211, robbery first with use
16 of a firearm.

17 On 11/19/76 at about 3:00 a.m. the
18 victim John and Irene Simmions, S-I-M-
19 M-I-O-N-S, were awakened at their
20 residence. Titch stated, "Don't move
21 or I'll blow your head off. I have a
22 gun." Titch cut the phone cord, went
23 through the dresser drawer, took keys
24 to the car, house, and business, and
25 left in the victim's 1975 Chevrolet
26 Monte Carlo. Items missing from the
27 home included \$280 in cash, one 32-

16

1 caliber Beretta handgun and a box of
2 ammunition.

3 Count four, Penal Code Section 211, robbery
4 first with the use of a firearm.

5 On 12/14/76 at about 4:20 a.m. Titch
6 entered the bedroom of Deborah Bradley,
7 B-R-A-D-L-E-Y, placed a handgun to her
8 head and asked her for money. He took
9 \$11 from her. He took her to her
10 parent's bedroom. He woke Alvin and
11 Eleanor Bradley with the gun at their
12 daughter's head. He got two one-dollar
13 bills, asked about guns and valuables,
14 and left via the front door.

15 Count six, Penal Code Section 211, robbery
16 first with the use of a firearm.

17 On 12/18/76 at about 2:30 a.m. Titch
18 and Thomas (codefendant) entered the
19 bedroom of the victims with a handgun
20 which they used to threaten them. They
21 took approximately \$27 from the
22 victim's purse and wallet. The
23 telephone wire was cut, and they left
24 the house.

25 Count seven, Penal Code Section 211,
26 robbery first with the use of a firearm.

27 On 12/21/76 at about 5:30 p.m. Titch

1 went to the service window of Theo's
2 Restaurant, showed a handgun and
3 demanded all of the clerk's money. The
4 clerk gave Titch about \$60, and then
5 fled the area on a bicycle.

6 Count nine, Penal Code Section 211, robbery
7 first with the use of a firearm.

8 On 12/27/76 at about 4:00 a.m. Titch
9 burglarized the home of Mr. and Mrs.
10 Lowell Gray. Items removed included
11 car keys and the victim's 1976
12 Chevrolet -- or Chrysler, excuse me,
13 Chrysler automobile.

14 Count 10, Penal Code Section 459, murder
15 second.

16 On 1/16/77 at about 9:00 a.m. Mr.
17 Armando Gomez, G-O-M-E-Z, returned to
18 his residence to discover that someone
19 entered his residence through the
20 window, taken the car keys from the
21 dining room table, and driven away in
22 his 1976 Chevrolet Monte Carlo.

23 Count 11 burglary, second degree, Penal
24 Code Section 459.

25 On 1/19/77 at about 11:00 a.m. Mertyl
26 (phonetic) Irene King, K-I-N-G,
27 returned to her residence and found

1 that someone had broken a large window
2 to her kitchen door to again enter to
3 her home. The house had been
4 ransacked, and the following items were
5 taken: \$35 in coins, a Ruger model
6 10/22 carbine rifle, one British
7 Enfield .303 carbine, two military 50-
8 caliber ammunition cans containing
9 approximately 1,000 rounds of 22-
10 caliber cartridges, and approximately
11 900 --

12 It says -- I'm sure it means rounds --

13 **INMATE TITCH:** It should say 90 rounds.

14 **PRESIDING COMMISSIONER DAVIS:** Well, it
15 says 900.

16 **INMATE TITCH:** Yeah.

17 **PRESIDING COMMISSIONER DAVIS:** It says 900,
18 what I sure means rounds and not pounds "of
19 military type 303 ammunition. Count two,
20 assault with a deadly weapon on a peace officer,
21 Penal Code Section 2456/12022.5, from the parole
22 officer's report dated 3/27/78, pages two, three
23 and six.

24 On 12/27/76 at approximately 8:50 a.m.
25 Mark Titch and his accomplice William
26 Hauper, H-A-U-P-E-R, committed armed
27 robbery at the Base Liquor Store, B-A-

1 S-E. Titch walked out with
2 approximately \$450. Officer Robb, R-O-
3 B-B, observed Titch exiting the store
4 and ordered Titch to stop walking.
5 Titch started walking towards the
6 officer, drew his weapon, and ordered
7 the officer to freeze. As Officer Robb
8 attempted to take cover behind his
9 parked vehicle, Titch fired
10 approximately eight to nine rounds, and
11 the officer was struck five times. The
12 officer did not draw his weapon. Titch
13 fled in the waiting vehicle driven by
14 William Hauper, H-A-U-P-E-R. Officer
15 Robb sustained several injuries to his
16 legs and collarbone, and is now retired
17 based on his medical disabilities.

18 Under the prisoner's version it states:

19 I am sincerely sorry for the crimes I
20 committed in 1976 and January 1977 and
21 regret all of the pain and suffering
22 that I have brought to so many people's
23 lives. I don't make any excuses for my
24 past actions because regardless of what
25 depravations or abuses I experienced as
26 a youth it doesn't justify robbing and
27 murdering innocent people or depriving

1 them of their property. I truly wish
2 with all my heart that I would have
3 made better decisions. If there were
4 any way that I could go back and undo
5 the harm that I perpetrated or any way
6 that I could make amends, I would
7 without hesitation. The crimes I
8 committed will always be a heavy burden
9 for me to live with, and they will
10 always fill me with tremendous sadness
11 and regret.

12 And under the area of clarification and
13 corrections:

14 In review of my 2003 life prisoner
15 evaluation report and other documents
16 contained in any prison file, I have
17 discovered that I would -- and would
18 like to correct some significant
19 factual errors. Although these factual
20 corrections in no way mitigate the
21 severity of my offense, I don't believe
22 a thorough and informed evaluation is
23 possible unless these clarifications
24 are made. These
25 corrections/clarifications are as
26 follows: I: My cumulative case
27 summary erroneously incorporates the

1 Orange County District Attorney's Penal
2 Code Section 1203.01 statement under
3 "facts": CYA diagnostic report" when
4 it should be listed under "DA's
5 review." II: The DA's Penal Code
6 Section -- P.C. 1203.01 statement
7 insinuates or claims as fact that A, I
8 stepped on the gas to muffle gun shots
9 during the Duncan robbery/murder; B,
10 attempted to rape Laura Straughton, S-
11 T-R-A-U-G-H-T-O-N, in her presence and
12 made her aware that she was about to be
13 killed, and B, I was aware Ms.
14 Straughton was clutching a rosary and
15 praying for her life. These statements
16 presented, in fact, are false or
17 misleading and there is no sworn
18 testimony or evidence that support
19 them. III: The CYA report that makes
20 the statement that my crime partner and
21 I fired rifle shells at or into Laura
22 Straughton's body as she knelt with a
23 Crucifix, which is completely untrue.
24 Furthermore, the CYA report lists
25 assault with attempt to commit murder,
26 threat of assault on a juvenile hall
27 counselor, and robbery and assault with

1 a deadly weapon as other charges as my
2 prior record, which is also untrue.
3 Many of these charges listed are
4 arrests not convictions, and the
5 assault with a deadly weapon is part of
6 my current offense not my prior record.
7 With respect to the Orange County
8 commitment, my records are unclear
9 about my role -- about what my role was
10 in the three robberies which resulted
11 in murder. With respect to the
12 robbery/murder of Laura Straughton I
13 was the sole perpetrator. I had no
14 predisposition to commit this crime,
15 but was induced by my crime partner
16 into believing that killing Laura
17 Straughton would prevent us from being
18 apprehended for the kidnapping, which
19 was a life offense. With respect to
20 the other robbery/murders, it was -- it
21 was an accomplice to what I thought
22 would be -- or excuse me, I was an
23 accomplice to what I thought would only
24 be robbery not murder. I didn't use a
25 firearm in either of these incidents,
26 even though one was available. And my
27 participation with this events was only

1 with great reluctance.

2 And counsel, I could offer that if your
3 client at any time would like to speak to us
4 about the instant offense, he is certainly
5 welcome to; however, we understand and respect
6 that he has an absolute right not to do so if he
7 so chooses. With regard to the record, we do
8 find that you were arrested in two -- or
9 according to the record -- according to the
10 board report, you were arrested for truancy in
11 February of 1972 for which you received six
12 months probation. On June of 1972 you were
13 arrested for malicious mischief, which you were
14 -- you went to juvenile hall on that? Now, were
15 you going to talk about your offenses or not, I
16 don't remember.

17 **INMATE TITCH:** This is all right.

18 **ATTORNEY CORYN:** Okay.

19 **INMATE TITCH:** The record, yes. The record
20 is fine.

21 **ATTORNEY CORYN:** Okay.

22 **PRESIDING COMMISSIONER DAVIS:** That way we
23 can kind of clarify what you remember about it -
24 -

25 **INMATE TITCH:** Yes.

26 **PRESIDING COMMISSIONER DAVIS:** -- and what
27 is you think is erroneous. So you went to

1 juvenile hall for malicious mischief?

2 **INMATE TITCH:** Yes.

3 **PRESIDING COMMISSIONER DAVIS:** Okay. Now,
4 that's normally an offense to which you would be
5 released back to your parents. How come you
6 weren't?

7 **INMATE TITCH:** Probably because my dad
8 wouldn't -- didn't want me out.

9 **PRESIDING COMMISSIONER DAVIS:** Okay. In
10 '73 you ran away, and you were continued as a
11 ward. In March of '73 you were arrested for
12 burglary, and you were committed to Rancho
13 Petraro (phonetic)?

14 **INMATE TITCH:** Yes. That's a juvenile
15 camp.

16 **PRESIDING COMMISSIONER DAVIS:** And for how
17 long were you committed there?

18 **INMATE TITCH:** I escaped. The next charge
19 was escape?

20 **PRESIDING COMMISSIONER DAVIS:** Yeah.

21 **INMATE TITCH:** Which was on --

22 **PRESIDING COMMISSIONER DAVIS:** So you
23 weren't there very long?

24 **INMATE TITCH:** Yeah, 3/21/73.

25 **PRESIDING COMMISSIONER DAVIS:** Okay. So
26 why did you escape?

27 **INMATE TITCH:** Because I didn't like it. I

1 didn't like the program.

2 **PRESIDING COMMISSIONER DAVIS:** Was it
3 fairly -- to escape, what did you have to do?

4 **INMATE TITCH:** Just walk away.

5 **PRESIDING COMMISSIONER DAVIS:** Walk away?

6 **INMATE TITCH:** Yeah.

7 **PRESIDING COMMISSIONER DAVIS:** On 4/20/73
8 you were returned placement, and this time you
9 went to Manchester. Is that correct?

10 **INMATE TITCH:** Yes. That was the juvenile
11 hall program.

12 **PRESIDING COMMISSIONER DAVIS:** Okay. Was
13 that a more secure facility?

14 **INMATE TITCH:** Yes, that was.

15 **PRESIDING COMMISSIONER DAVIS:** Okay. On
16 10/16/73 assault with intend to commit murder.

17 **INMATE TITCH:** Okay. Now, that was an
18 arrest, but I believe that charge was dismissed.
19 It says --

20 **PRESIDING COMMISSIONER DAVIS:** There's no
21 disposition indicated here.

22 **INMATE TITCH:** Yeah, it says disposition
23 not available.

24 **PRESIDING COMMISSIONER DAVIS:** Correct.

25 **INMATE TITCH:** And then it says -- where
26 did I see that? Okay. Further down on 11/12/73
27 it says tried Orange County Superior Court --

1 **PRESIDING COMMISSIONER DAVIS:** For
2 burglary.

3 **INMATE TITCH:** Yeah, maybe that's not --

4 **PRESIDING COMMISSIONER DAVIS:** There's no
5 disposition is indicated here. It is not
6 available also. And the 10/28/73, assault on a
7 counselor. What happened with that one?

8 **INMATE TITCH:** That wasn't even an arrest.
9 I don't know how that got in there.

10 **PRESIDING COMMISSIONER DAVIS:** Did you --
11 or did you threaten a counselor while you were
12 at camp?

13 **INMATE TITCH:** Well, probably in juvenile
14 hall.

15 **PRESIDING COMMISSIONER DAVIS:** Okay.

16 **INMATE TITCH:** Yeah.

17 **PRESIDING COMMISSIONER DAVIS:** They
18 probably took a crime report on it, but there
19 may not be any disposition on --

20 **INMATE TITCH:** Yeah, because I don't even
21 remember being arrested or going to court on
22 that or nothing, so that's why I kind a --

23 **PRESIDING COMMISSIONER DAVIS:** 12/12/73,
24 armed robbery, committed to CYA?

25 **INMATE TITCH:** Yeah. Now, that is where
26 the assault with intent to commit murder with
27 that armed robbery is tied to that, but that

1 assault with intent to commit murder was
2 dropped.

3 **PRESIDING COMMISSIONER DAVIS:** Okay.

4 **INMATE TITCH:** There should of been like
5 four charges there dropped.

6 **PRESIDING COMMISSIONER DAVIS:** So what was
7 the crime that you actually -- what did you
8 actually do?

9 **INMATE TITCH:** Armed robbery.

10 **PRESIDING COMMISSIONER DAVIS:** Okay.

11 **INMATE TITCH:** Oh, in the assault with
12 intent to commit murder? I actually fired a gun
13 in the air.

14 **PRESIDING COMMISSIONER DAVIS:** Okay. So
15 you were committing a armed robbery?

16 **INMATE TITCH:** But since it was slightly,
17 you know, I was running away from the guy, and
18 it was in the air slightly over his head. Not,
19 you know, like I'm not saying a foot or two, I'm
20 saying in the air. That's probably where they
21 originally charged with assault with intent to
22 commit --

23 **PRESIDING COMMISSIONER DAVIS:** But you were
24 in the middle of -- you had gotten out of camp?

25 **INMATE TITCH:** Right.

26 **PRESIDING COMMISSIONER DAVIS:** And how old
27 were you at this time?

1 **INMATE TITCH:** '73? Well, I was born in
2 '59, so that's '69 -- 14 years old.

3 **PRESIDING COMMISSIONER DAVIS:** And so you
4 committed -- but you committed armed robbery?

5 **INMATE TITCH:** Yeah.

6 **PRESIDING COMMISSIONER DAVIS:** Where did
7 you get the gun?

8 **INMATE TITCH:** From one of my friends.
9 Actually, it was my neighbor. He had run away
10 with me.

11 **PRESIDING COMMISSIONER DAVIS:** Yeah.

12 **INMATE TITCH:** And I took his mom's gun.

13 **PRESIDING COMMISSIONER DAVIS:** Oh, okay.

14 **INMATE TITCH:** It was a little 22 handgun.

15 **PRESIDING COMMISSIONER DAVIS:** And then on
16 12/28/75 -- now, so you were committed, but you
17 were caught and tried and sent back to CYA in,
18 was that 12 --

19 **INMATE TITCH:** Well, actually that was the
20 first time that I went to YA for the armed
21 robbery.

22 **PRESIDING COMMISSIONER DAVIS:** All right.
23 But you had been at camp and juvenile hall
24 before that?

25 **INMATE TITCH:** Right.

26 **PRESIDING COMMISSIONER DAVIS:** And this
27 time you went to YA?

1 **INMATE TITCH:** Right.

2 **PRESIDING COMMISSIONER DAVIS:** How long
3 were you in YA?

4 **INMATE TITCH:** On that time I think I was
5 at least a year, I believe.

6 **PRESIDING COMMISSIONER DAVIS:** So you --

7 **INMATE TITCH:** Or pretty close to that.

8 **PRESIDING COMMISSIONER DAVIS:** So within
9 about a year or less after getting out of YA you
10 were arrested for auto theft?

11 **INMATE TITCH:** Yes.

12 **PRESIDING COMMISSIONER DAVIS:** Okay.

13 **INMATE TITCH:** And then I went back to YA.

14 **PRESIDING COMMISSIONER DAVIS:** Now, why did
15 you steal a car?

16 **INMATE TITCH:** I don't know, just stupid,
17 stupid kid stuff.

18 **PRESIDING COMMISSIONER DAVIS:** Were you
19 going to sell it, or what were you going to do
20 with it?

21 **INMATE TITCH:** No, just drive it around.

22 **PRESIDING COMMISSIONER DAVIS:** Where did
23 you learn how to steal cars?

24 **INMATE TITCH:** I didn't hot wire them or
25 nothing. I just usually found them in -- the
26 keys in them or something like that.

27 **PRESIDING COMMISSIONER DAVIS:** The keys was

1 in it?

2 INMATE TITCH: Yeah.

3 PRESIDING COMMISSIONER DAVIS: Took it
4 away?

5 INMATE TITCH: Yeah.

6 PRESIDING COMMISSIONER DAVIS: And you got
7 caught?

8 INMATE TITCH: Yeah.

9 PRESIDING COMMISSIONER DAVIS: And you went
10 back to YA?

11 INMATE TITCH: Yeah. Yes, I went back to
12 YA.

13 PRESIDING COMMISSIONER DAVIS: Now, when
14 did they send you back to San Diego juvenile
15 hall?

16 INMATE TITCH: Okay. Then I got out of YA.
17 I went to a halfway house, and then I got
18 arrested for burglary, grand theft auto.

19 PRESIDING COMMISSIONER DAVIS: Okay.

20 INMATE TITCH: And then while I was waiting
21 adjudication on that -- or actually, I had
22 actually been found guilty, and while I was
23 waiting to go to YA again I escaped.

24 PRESIDING COMMISSIONER DAVIS: Now this
25 time you escaped from juvenile hall?

26 INMATE TITCH: Right.

27 PRESIDING COMMISSIONER DAVIS: A little bit

1 more of a difficult situation than a camp?

2 **INMATE TITCH:** Yes.

3 **PRESIDING COMMISSIONER DAVIS:** How did you
4 do that?

5 **INMATE TITCH:** I scaled the -- one of the
6 walls up on the roof.

7 **PRESIDING COMMISSIONER DAVIS:** What was
8 your plan? Where were you headed?

9 **INMATE TITCH:** I didn't have any concrete
10 plans or nothing. I didn't know anybody, so
11 basically it was just, you know, life back on
12 the streets again.

13 **PRESIDING COMMISSIONER DAVIS:** So were you
14 out on this escape when the instant offense
15 occurred?

16 **INMATE TITCH:** Yes.

17 **PRESIDING COMMISSIONER DAVIS:** Okay. And
18 that's -- those are the robbery assault charges
19 and so forth listed in December of '76? Is that
20 accurate?

21 **INMATE TITCH:** Yeah. That's part of this
22 commitment offense.

23 **PRESIDING COMMISSIONER DAVIS:** Right.
24 That's what I'm saying.

25 **INMATE TITCH:** Okay.

26 **PRESIDING COMMISSIONER DAVIS:** Okay. All
27 right. Anything we're missing out of that, or

1 anything you want to add for clarification for
2 that?

3 **INMATE TITCH:** Nope. I think that's pretty
4 much it. I had some stuff highlighted here.
5 The only thing that -- you read the
6 clarification and correction statement?

7 **PRESIDING COMMISSIONER DAVIS:** Uh-huh.

8 **INMATE TITCH:** And the only thing that I
9 wanted to --

10 **ATTORNEY CORYN:** With respect to --

11 **INMATE TITCH:** Yeah, point two --

12 **ATTORNEY CORYN:** Point four --

13 **INMATE TITCH:** Yeah, they kind of had typos
14 in that. They missed out. I had what points A,
15 B, C and D, and I think they ran it into A, B,
16 and then they went into D, and they forgot C
17 altogether.

18 **PRESIDING COMMISSIONER DAVIS:** What was C?

19 **INMATE TITCH:** Why don't you give them
20 that?

21 **ATTORNEY CORYN:** You mean one, two, three
22 and four?

23 **INMATE TITCH:** No, no, no, no.

24 **PRESIDING COMMISSIONER DAVIS:** No, like
25 Roman Numeral two has A, B -- you're right, and
26 then it goes to D from there.

27 **INMATE TITCH:** Yeah, can you --

1 **ATTORNEY CORYN:** Yeah.

2 **INMATE TITCH:** -- just hand them that copy
3 right there?

4 **PRESIDING COMMISSIONER DAVIS:** Okay. This
5 is a --

6 **ATTORNEY CORYN:** Is this something that's
7 missing C?

8 **INMATE TITCH:** Yeah, it's a duplicate, but
9 if you look at point two, you could see the
10 typos in there.

11 **PRESIDING COMMISSIONER DAVIS:** Okay. Is
12 this something that you typed up?

13 **INMATE TITCH:** Yes.

14 **PRESIDING COMMISSIONER DAVIS:** All right.

15 **INMATE TITCH:** And I submitted that with
16 this report.

17 **PRESIDING COMMISSIONER DAVIS:** So they
18 copied this -- they copied down theirs from
19 yours and just simply left out C, which says,
20 "My crime partner and I discussed killing Laura
21 Straughton in her presence and made her aware
22 that she was about to be killed." And then goes
23 onto D, "I was aware that Ms. Straughton was
24 clutching a rosary and praying for her life." I
25 think that's actually in here but it's just not
26 listed as C?

27 **INMATE TITCH:** Yes. Right.

1 **PRESIDING COMMISSIONER DAVIS:** Okay.

2 **INMATE TITCH:** They just ran it kind
3 together.

4 **PRESIDING COMMISSIONER DAVIS:** All right.

5 **INMATE TITCH:** And I asked them to clear --
6 in retrospect, the bottom statement, the last
7 sentence.

8 **PRESIDING COMMISSIONER DAVIS:** Number --

9 **INMATE TITCH:** The very bottom there.

10 **PRESIDING COMMISSIONER DAVIS:** Number four?

11 **ATTORNEY CORYN:** Yeah.

12 **INMATE TITCH:** Yes.

13 **PRESIDING COMMISSIONER DAVIS:** Roman
14 Numeral four?

15 **INMATE TITCH:** Where I said some of my
16 participation --

17 **PRESIDING COMMISSIONER DAVIS:** And some of
18 the elements --

19 **INMATE TITCH:** Right.

20 **PRESIDING COMMISSIONER DAVIS:** -- of these
21 events?

22 **INMATE TITCH:** Right.

23 **PRESIDING COMMISSIONER DAVIS:** Okay.

24 **INMATE TITCH:** Okay.

25 **PRESIDING COMMISSIONER DAVIS:** All right.

26 So in -- and just for the clarification for the
27 person -- for the transcriptionist then, for

1 Roman Numeral four, which is the last of the
2 correction statement, the last -- next to the
3 last line should read, "and my participation in
4 some of the elements of those events was only
5 with great reluctance." All right. Does that
6 satisfy?

7 **INMATE TITCH:** Thank you, sir.

8 **PRESIDING COMMISSIONER DAVIS:** All right.
9 Thank you, officer. All right. In terms of the
10 social history then we have that you were born
11 in 1959 and raised in Anaheim, California. You
12 are the fourth of six children, three boys and
13 three girls. At age 11 your parents divorced.
14 Your father received legal custody, and then you
15 -- this says you fluctuated in placement between
16 parents and various court ordered placements.
17 So you kind of back and forth between mom and
18 dad? Is that --

19 **INMATE TITCH:** No.

20 **PRESIDING COMMISSIONER DAVIS:** What
21 happened?

22 **INMATE TITCH:** No, my -- actually, my mom
23 moved out. So actually, I went back and forth
24 between juvenile hall, camp and my father.

25 **PRESIDING COMMISSIONER DAVIS:** Okay. So
26 this was actually because you were committing
27 crimes during that time, right?

1 **INMATE TITCH:** At -- in the initial stage,
2 no, it was for running away from home.

3 **PRESIDING COMMISSIONER DAVIS:** Okay. So
4 then --

5 **INMATE TITCH:** And then, yes, it progressed
6 into committing burglaries and stealing cars and
7 stuff, yes.

8 **PRESIDING COMMISSIONER DAVIS:** So which --
9 the running away from home came first --

10 **INMATE TITCH:** Yes.

11 **PRESIDING COMMISSIONER DAVIS:** -- before
12 you started committing crimes?

13 **INMATE TITCH:** Yes.

14 **PRESIDING COMMISSIONER DAVIS:** Okay.

15 **INMATE TITCH:** And in fact, I noticed they
16 listed a truancy there, and that's probably
17 because I ran away from home, but instead of
18 charging me with runaway, they only charged me
19 with truancy and dropped the runaway part that
20 first time.

21 **PRESIDING COMMISSIONER DAVIS:** Okay.

22 **INMATE TITCH:** But I think the first three
23 or four times was all truancy, incorrigible
24 running away.

25 **PRESIDING COMMISSIONER DAVIS:** So were you
26 using any drugs or alcohol at this time?

27 **INMATE TITCH:** No, not -- no.

1 **PRESIDING COMMISSIONER DAVIS:** Not at all?

2 **INMATE TITCH:** No.

3 **PRESIDING COMMISSIONER DAVIS:** Okay. Have
4 you ever?

5 **INMATE TITCH:** Yes, of course.

6 **PRESIDING COMMISSIONER DAVIS:** Well, what
7 about -- of course?

8 **INMATE TITCH:** Well, when I got older,
9 yeah, 17.

10 **PRESIDING COMMISSIONER DAVIS:** Yeah?

11 **INMATE TITCH:** Yeah. I mean, I really
12 didn't have too much of drug or alcohol because
13 I was incarcerated a lot, you know, a lot of the
14 time, so anyways --

15 **PRESIDING COMMISSIONER DAVIS:** Was the
16 drugs and/or alcohol ever a problem for you?

17 **INMATE TITCH:** No.

18 **PRESIDING COMMISSIONER DAVIS:** Did you ever
19 feel out of control as a result --

20 **INMATE TITCH:** No.

21 **PRESIDING COMMISSIONER DAVIS:** -- of the
22 use of drugs and/or alcohol?

23 **INMATE TITCH:** No.

24 **PRESIDING COMMISSIONER DAVIS:** Was -- did
25 you have a drug of choice, including alcohol?

26 **INMATE TITCH:** Yeah, I didn't like alcohol,
27 you know, I preferred to smoke marijuana.

1 **PRESIDING COMMISSIONER DAVIS:** Okay.

2 **INMATE TITCH:** Yeah.

3 **PRESIDING COMMISSIONER DAVIS:** How often
4 would you smoke marijuana?

5 **INMATE TITCH:** When I was 17, probably
6 every day.

7 **PRESIDING COMMISSIONER DAVIS:** Okay. And
8 Counsel, there were several things I know you
9 didn't want to talk about, so if I begin to
10 tread on some of those, please don't hesitate to
11 bring that to my attention.

12 **ATTORNEY CORYN:** Okay.

13 **PRESIDING COMMISSIONER DAVIS:** So you're
14 smoking marijuana virtually every day?

15 **INMATE TITCH:** Yeah.

16 **PRESIDING COMMISSIONER DAVIS:** Okay.

17 **INMATE TITCH:** When I was 17.

18 **PRESIDING COMMISSIONER DAVIS:** And when did
19 you -- starting about age 17?

20 **INMATE TITCH:** Yeah.

21 **PRESIDING COMMISSIONER DAVIS:** Why did you
22 start doing it at age 17? What happened?

23 **INMATE TITCH:** I don't know why, you know,
24 it's just -- it really, you know, it really
25 didn't become a factor until like the last time
26 I got out of YA. Drugs were like, you know, I
27 wasn't --

1 **PRESIDING COMMISSIONER DAVIS:** Was it --

2 **INMATE TITCH:** -- immersed in a drug
3 culture, put it that way.

4 **PRESIDING COMMISSIONER DAVIS:** Was there a
5 different group of people that you were with --

6 **INMATE TITCH:** Yeah.

7 **PRESIDING COMMISSIONER DAVIS:** -- where it
8 was more common?

9 **INMATE TITCH:** Yeah, oh yeah, it was lot
10 more common. It was like the thing to do. You
11 know, it was -- when I got out of YA it was
12 totally different. That was the culture, you
13 know, smocking pot, listening to music, going to
14 concerts and stuff like that. It all changed,
15 so that's what I got out too.

16 **PRESIDING COMMISSIONER DAVIS:** Okay. None
17 of your other brothers and sisters have been
18 involved in law enforcement with the exception
19 of your brother who has had some emotional
20 problems?

21 **INMATE TITCH:** Yeah, well, actually he's a
22 lot more than emotional. He's DDP, and he's
23 also --

24 **PRESIDING COMMISSIONER DAVIS:** DDP stands
25 for?

26 **INMATE TITCH:** Developmentally disabled.

27 **PRESIDING COMMISSIONER DAVIS:** Okay.

1 **INMATE TITCH:** And he's also schizophrenic.

2 **PRESIDING COMMISSIONER DAVIS:** Has that
3 gotten into problems with law enforcement?

4 **INMATE TITCH:** Yes.

5 **PRESIDING COMMISSIONER DAVIS:** Does he --

6 **INMATE TITCH:** It's actually ended him up
7 here.

8 **PRESIDING COMMISSIONER DAVIS:** Yeah.

9 **INMATE TITCH:** Yeah.

10 **PRESIDING COMMISSIONER DAVIS:** Is he
11 getting appropriate medication now do you think?

12 **INMATE TITCH:** Well, I don't know if it can
13 be, you know, treated. Schizophrenia you can
14 only do so much, you know. He's improved a
15 little bit, but he needs to be committed to a
16 hospital because his mental state is that far
17 gone. I tried to help and do what I could to
18 get him in the hospital from here, and he's
19 getting -- I just found out today that he's
20 going back to Atascadero State Hospital. I
21 don't know for how long. He's been there before
22 and gets out on parole, and they put them in
23 these homes, but you know, he doesn't last very
24 long because he gets into conflicts about his
25 money and stuff like that.

26 **PRESIDING COMMISSIONER DAVIS:** Yeah.

27 **INMATE TITCH:** Or he starts drinking, and

1 he just really needs to be in a hospital. A
2 prison -- he's never going to get any better in
3 my opinion than what it is now, and he needs to
4 be committed.

5 **PRESIDING COMMISSIONER DAVIS:** Okay. Other
6 siblings are doing all right though?

7 **INMATE TITCH:** Yeah.

8 **PRESIDING COMMISSIONER DAVIS:** Do you stay
9 in contact with them?

10 **INMATE TITCH:** I don't write my oldest
11 sister anymore because she had a drug problem,
12 and I kind a -- it kind of burned me out on
13 that, but I hear from my little sister. In
14 fact, they said I was mostly -- one of these
15 reports said I was mostly in contact with my
16 little brother. Actually, it's my little sister
17 Candy who lives in New Mexico, and she's
18 primarily the main one who I write to.

19 **PRESIDING COMMISSIONER DAVIS:** Okay.

20 **INMATE TITCH:** Every now and then I hear
21 from my brother, but it's just, you know,
22 sparse.

23 **PRESIDING COMMISSIONER DAVIS:** And your
24 father was a strict disciplinarian and mentally
25 abusive and an alcoholic, and the police were
26 often at your house for family fights and
27 problems?

1 **INMATE TITCH:** Yeah.

2 **PRESIDING COMMISSIONER DAVIS:** How do you
3 know your father was an alcoholic?

4 **INMATE TITCH:** Well, I mean looking back in
5 retrospect -- I didn't at the time, but looking
6 back in retrospect I now know, you know, he used
7 to go to the garage a lot to drink but he kept
8 it hidden. And also there were times when he
9 got -- my stepmother had to go pick him up at
10 work because he was drunk, you know, he couldn't
11 perform his job. And also just knowing him
12 personally, you know, sometimes he would come
13 and get in arguments with me, either about
14 frivolous stuff or about stuff that made
15 absolutely no sense.

16 **PRESIDING COMMISSIONER DAVIS:** Was he ever
17 physically abusive?

18 **INMATE TITCH:** No.

19 **PRESIDING COMMISSIONER DAVIS:** No bruises
20 or broken bones or nothing like that?

21 **INMATE TITCH:** No, he never really hit me
22 until I got older, and it really wasn't like --
23 he didn't beat on me or nothing like that, but
24 there was a lot of verbal abuse all the time
25 from him.

26 **PRESIDING COMMISSIONER DAVIS:** Okay. And
27 you describe your family as dysfunctional with

1 the mental abuse and so forth, and indicated
2 that was one of the reasons why you began to run
3 away?

4 **INMATE TITCH:** Yeah.

5 **PRESIDING COMMISSIONER DAVIS:** That you
6 have worked only on occasion. What kind of work
7 did you do?

8 **INMATE TITCH:** I only worked -- the only
9 job that I can remember having was at an
10 electronics firm assembling electronic boards,
11 circuit boards.

12 **PRESIDING COMMISSIONER DAVIS:** Yeah.

13 **INMATE TITCH:** And I only kept that a
14 little while, and then I was arrested and lost
15 that job.

16 **PRESIDING COMMISSIONER DAVIS:** Said you did
17 casual smoking of marijuana?

18 **INMATE TITCH:** Yeah.

19 **PRESIDING COMMISSIONER DAVIS:** Some
20 experimentation with other drugs. What other
21 drugs did you experiment with?

22 **INMATE TITCH:** I experimented with LSD. I
23 think I tried PCP once or twice, and peyote, you
24 know, some peyote once or twice.

25 **PRESIDING COMMISSIONER DAVIS:** Okay.

26 **INMATE TITCH:** Not, nothing major.

27 **PRESIDING COMMISSIONER DAVIS:** No children?

1 **INMATE TITCH:** No, no children.

2 **PRESIDING COMMISSIONER DAVIS:** And it
3 doesn't talk about your education much. Did you
4 -- you didn't graduate from high school?

5 **INMATE TITCH:** Right.

6 **PRESIDING COMMISSIONER DAVIS:** Did you get
7 your GED in here?

8 **INMATE TITCH:** Yeah, I got my GED.

9 **PRESIDING COMMISSIONER DAVIS:** Okay. We'll
10 talk about that more in just a little bit.

11 **INMATE TITCH:** Yeah.

12 **PRESIDING COMMISSIONER DAVIS:** Is there
13 anything that I haven't asked you about with
14 regard to your criminal history or your social
15 history that you believe is important for this
16 Panel to understand this afternoon?

17 **INMATE TITCH:** I don't think so. I think
18 you pretty much covered everything. I'll just
19 take a look at this real quick.

20 **PRESIDING COMMISSIONER DAVIS:** All right.
21 All right. If you think of anything --

22 **INMATE TITCH:** I think we're fine.

23 **PRESIDING COMMISSIONER DAVIS:** Okay. Well,
24 if you think of anything that we've missed or if
25 something comes up, something strikes you a
26 little bit later, you can always come back.
27 Commissioner Armenta, do you have any questions?

1 **DEPUTY COMMISSIONER ARMENTA:** No.

2 **PRESIDING COMMISSIONER DAVIS:** Okay. I'll
3 ask you to turn your attention now to
4 Commissioner Armenta.

5 **INMATE TITCH:** Okay.

6 **DEPUTY COMMISSIONER ARMENTA:** Okay. Let's
7 go over your plans.

8 **INMATE TITCH:** Okay.

9 **DEPUTY COMMISSIONER ARMENTA:** Okay. First
10 of all, though I should report that we did
11 receive -- did receive a letter from the city of
12 Anaheim --

13 **INMATE TITCH:** Uh-huh.

14 **DEPUTY COMMISSIONER ARMENTA:** -- Police.
15 We send out what are known as 3042 notices, and
16 as a response we received two letters.

17 **INMATE TITCH:** Okay. That's in opposition
18 to parole?

19 **DEPUTY COMMISSIONER ARMENTA:** Yes.

20 **INMATE TITCH:** Yes.

21 **DEPUTY COMMISSIONER ARMENTA:** One is from
22 the police department, the other is from the
23 DA's office.

24 **INMATE TITCH:** Right.

25 **DEPUTY COMMISSIONER ARMENTA:** We do have
26 someone here from the DA's office.

27 **INMATE TITCH:** Right.

1 **DEPUTY COMMISSIONER ARMENTA:** But since we
2 don't have anyone here from the police
3 department, I am going to read the letter into
4 the record.

5 **INMATE TITCH:** Okay.

6 **DEPUTY COMMISSIONER ARMENTA:** May 24th,
7 2006.

8 Dear Board of Prison Terms, I am the
9 sergeant of the Anaheim Police
10 Department's Homicide Detail. I have
11 received a notice that a subsequent
12 parole hearing for Mark Titch is to be
13 held on July 19th, 2006. I would like
14 to offer my opinion as to the
15 suitability of parole. Mr. Titch was
16 convicted of several offenses,
17 including two counts of first-degree
18 murder in the city of Anaheim.
19 Although I was not involved in this
20 investigation, I reviewed the
21 investigation case files. The
22 investigation revealed the following
23 facts: During 1976 and 1977 Mark Titch
24 and his accomplice set out on an
25 extremely violent crime spree that left
26 a wake of a minimal of four dead people
27 and two critically wounded, including a

1 San Diego police officer. One of these
2 crimes involved Titch shooting and
3 killing Mr. Aubrey Duncan, a local
4 businessman, during the course of a
5 robbery. Titch and his accomplice also
6 shot and injured Mrs. Nadine Duncan,
7 Mr. Duncan's wife, and brutally shot
8 and killed their 18 year-old daughter
9 Denise Duncan. Mrs. Duncan was
10 critically wounded and had to have part
11 of her liver and spleen removed. As
12 one could imagine, this incident
13 devastated the Duncan family. They
14 have had to bear the scars of this
15 crime of unspeakable evil ever since.
16 This should have been enough to keep
17 Mark Titch in prison for the rest of
18 his life, but he has admitted to having
19 committed an extremely high number of
20 extremely violent crimes in the two
21 years from the time -- in the two years
22 up to the time of his arrest. These
23 crimes included a kidnap of Ms. Laura
24 Straughton from the city of Garden
25 Grove, taken for the purpose of
26 robbery, of Ms. Straughton to the city
27 of Orange. The shooting and murder of

1 Ms. Straughton with a rifle, the murder
2 of Efran Christian, (phonetic), who was
3 shot during the attempted robbery of
4 the business where he worked. The
5 shooting and critically wounding of a
6 San Diego police officer James Robb
7 when he attempted to stop Titch after
8 Titch committed an armed residential
9 robbery in San Diego, California, two
10 residential robberies in the city of
11 Anaheim, one residential robbery in the
12 city of Stanton, two commercial armed
13 robberies in the city of Anaheim, a
14 residential burglary in which firearms
15 were stolen and he later used to commit
16 the listed murders, the commission of
17 several additional burglaries. Having
18 brutally murdered four different people
19 in three separate incidents and having
20 wounded two additional victims during
21 this crime spree, it should be readily
22 apparent to anyone that Mark Titch is
23 an extreme danger to society, and he
24 should not be granted parole at this
25 time or any time in the future. It is
26 obvious that Mark Titch has not learned
27 anything since he has been in custody,

1 and he also committed an assault on a
2 life prisoner while incarcerated for
3 these crimes. Mark Titch also spent
4 the -- should spend the rest of his
5 miserable wrench existence in prison.
6 His crimes were extremely brutal, cold
7 blooded, planned, calculated and
8 vicious. He has no regard whatsoever
9 for the life of others and the impact
10 that his crimes have upon the lives of
11 surviving family members and friends.
12 It should be readily apparent from the
13 above information that Mark Titch
14 should never be paroled or allowed the
15 opportunity to again victimize innocent
16 citizens. Anaheim Police Department
17 opposes his release. Thank you for the
18 opportunity to express my opinion in
19 this matter. Don't hesitate to contact
20 me if I can be of further assistance.

21 Signed Sergeant David Flutts, F-L-U-T-T-S.
22 And as stated, we also have a letter from the
23 office of the DA; however, we do have a member
24 here and we have no need to read that letter.

25 **INMATE TITCH:** Yeah, okay.

26 **DEPUTY COMMISSIONER ARMENTA:** Yeah. Now,
27 we also have letters for you, a number of

1 letters from friends.

2 **INMATE TITCH:** Yes.

3 **DEPUTY COMMISSIONER ARMENTA:** And we also
4 have your package, and sometime in the next few
5 minutes I will be going over the information.

6 **INMATE TITCH:** Okay.

7 **DEPUTY COMMISSIONER ARMENTA:** What I was
8 doing when I got it I was checking that with
9 your C file.

10 **INMATE TITCH:** Okay.

11 **DEPUTY COMMISSIONER ARMENTA:** And it's in
12 there.

13 **INMATE TITCH:** Okay.

14 **DEPUTY COMMISSIONER ARMENTA:** You got a
15 short letter here, says from Pat Mullen
16 (phonetic) of San Luis Obispo.

17 **INMATE TITCH:** Mullon (phonetic).

18 **DEPUTY COMMISSIONER ARMENTA:** Mullon?

19 **INMATE TITCH:** Yeah.

20 **DEPUTY COMMISSIONER ARMENTA:** And says,
21 "Please find a copy of letter of support for
22 Mark Titch." Basically saying that she's
23 supports your release. The letter is dated May
24 9th, 2006. She has known Mark since 1984, over
25 22 years, first as an M-2 sponsor and later as a
26 friend and mentor. "And throughout that time I
27 have seen Mark work hard to improve himself

1 personally, mentally, spiritually, and
2 vocationally so he will be positive productive
3 citizen when he is paroled. Over the years I
4 have personally witnessed Mark's dedicated and
5 positive efforts to earn a college AA degree,
6 nearly complete his BA degree, and acquire
7 numerous vocational skills, including drafting,
8 welding, electrician, and construction traits so
9 he can be a successful productive citizen when
10 he is paroled. Mark also has a strong support
11 network on the outside willing and able to help
12 him make that transition to a productive member
13 of society."

14 (Off the Record)

15 DEPUTY COMMISSIONER ARMENTA: Okay. We are
16 on side two. Okay.

17 Mark's focus has been to better himself
18 in all respects and to prepare himself
19 for a successful return to society.
20 Mark is remorseful for his past deeds
21 and takes responsibility for his
22 actions. He has used his time in
23 prison the best way possible,
24 understanding what he did, accepting
25 responsibility, and working hard to
26 improve himself and to pay a debt to
27 society. Mark has been able to change

52

1 for the better while in prison,
2 remaining positive, improving himself,
3 working and trustee in inmate labor
4 programs, all the while continuing his
5 education and continuing to work to
6 prepare for a successful transition
7 back into society as a productive law-
8 abiding citizen. If you look through
9 Mark's files you will see a person who
10 has earned the trust and support from a
11 broad range of people. These people
12 have seen him in many different
13 situations. They all support and
14 commend him for how he has conducted
15 himself while incarcerated and how he
16 has remained positively focused on
17 preparing himself for making a
18 successful transition back into
19 society. I urge you to give him -- to
20 give his case very deliberate and
21 careful attention, and your full
22 consideration.

23 Signed Pat Mullan.

24 **INMATE TITCH:** Mullan.

25 **DEPUTY COMMISSIONER ARMENTA:** Mullan?

26 **INMATE TITCH:** Yeah.

27 **DEPUTY COMMISSIONER ARMENTA:** San Luis

1 Obispo.

2 **INMATE TITCH:** Yeah.

3 **DEPUTY COMMISSIONER ARMENTA:** I got a
4 similar letter, except a lot longer, from Lenona
5 (phonetic).

6 **INMATE TITCH:** Lenona.

7 **DEPUTY COMMISSIONER ARMENTA:** Lenona
8 Carlburg (phonetic).

9 **INMATE TITCH:** Carlburg.

10 **DEPUTY COMMISSIONER ARMENTA:** Carlburg.

11 **ATTORNEY CORYN:** See if Lenona Carlburg --

12 **INMATE TITCH:** Yeah.

13 **ATTORNEY CORYN:** Marty Freeman (phonetic).

14 **DEPUTY COMMISSIONER ARMENTA:** Marty
15 Freeman's letter, it's a letter of employment.

16 **INMATE TITCH:** Okay. That was important
17 that you have --

18 **DEPUTY COMMISSIONER ARMENTA:** Yeah.

19 I'm writing on behalf of Mark Titch in
20 regards to employment. This letter is
21 to confirm that Mark has a job with my
22 company immediately upon release. My
23 company does all types of yaught
24 maintenance, including wax and polish,
25 wash down services, mechanics and
26 underwater maintenance as well. Mark's
27 skills and personality traits are

1 exactly what we're looking for. I've
2 been in the business for three years.
3 My business has grown at a rate of
4 about a hundred clients per week and
5 approximately 310 customers as of this
6 date. With that percent of growth, I
7 need good dependable people to work.
8 Mark's starting salary, hourly rate
9 will be \$14 an hour. And with Mark's
10 ability, I'm sure he will be making \$22
11 per hour within eight months.

12 And it's signed Marty Freeman. The
13 letterhead is Marty's Marine Services, and
14 that's in the city of Chula Vista. There's also
15 a phone number.

16 **INMATE TITCH:** Yes.

17 **DEPUTY COMMISSIONER ARMENTA:** And you've
18 known him for how long?

19 **INMATE TITCH:** Since 2000.

20 **DEPUTY COMMISSIONER ARMENTA:** 2000?

21 **INMATE TITCH:** Yeah.

22 **DEPUTY COMMISSIONER ARMENTA:** You also have
23 a letter of support from Maxine?

24 **INMATE TITCH:** Yes.

25 **DEPUTY COMMISSIONER ARMENTA:** Roboloski
26 (phonetic).

27 **INMATE TITCH:** Roboloski. Yeah, that's a

1 tough one there.

2 **DEPUTY COMMISSIONER ARMENTA:** And there's a
3 letter from Lenona. Where would you live?

4 **INMATE TITCH:** El Cajon.

5 **DEPUTY COMMISSIONER ARMENTA:** With her?

6 **INMATE TITCH:** Yes.

7 **DEPUTY COMMISSIONER ARMENTA:** Okay. You
8 got to point to me because I read the letter. I
9 was trying to find where she says that you could
10 live with her.

11 **INMATE TITCH:** That should -- okay. I
12 would have to --

13 **DEPUTY COMMISSIONER ARMENTA:** Here's her
14 letter.

15 **INMATE TITCH:** Okay. Thank you.

16 **DEPUTY COMMISSIONER ARMENTA:** Basically,
17 her letter says that she began to visit your
18 cellmate seven years ago, and then she began to
19 visit with you five years ago. Oh, here it is.
20 I would furnish room, board and transportation
21 along with friendship and encouragement, right?

22 **INMATE TITCH:** Yeah.

23 **DEPUTY COMMISSIONER ARMENTA:** That's what I
24 was looking for.

25 **INMATE TITCH:** Yeah, there you go.

26 **DEPUTY COMMISSIONER ARMENTA:** It's on page
27 two --

1 INMATE TITCH: Right.

2 DEPUTY COMMISSIONER ARMENTA: -- of the
3 letter.

4 INMATE TITCH: Okay.

5 DEPUTY COMMISSIONER ARMENTA: Yeah.

6 INMATE TITCH: I think he's got it in the
7 other -- in this one.

8 ATTORNEY CORYN: Okay.

9 INMATE TITCH: I don't think it's in the --

10 ATTORNEY CORYN: I would stipulate --

11 INMATE TITCH: They're in my C file though.

12 DEPUTY COMMISSIONER ARMENTA: Yeah, it's
13 here. That's where I got it. I got it from the
14 package.

15 ATTORNEY CORYN: Oh, I see.

16 DEPUTY COMMISSIONER ARMENTA: And that's on
17 page two towards the bottom?

18 INMATE TITCH: Right.

19 DEPUTY COMMISSIONER ARMENTA: Yeah, that's
20 what I was looking for.

21 INMATE TITCH: Okay.

22 DEPUTY COMMISSIONER ARMENTA: And probably
23 didn't really catch it because most of the time
24 we read the words "I will furnish housing."

25 INMATE TITCH: Oh.

26 DEPUTY COMMISSIONER ARMENTA: In your case
27 it says room -- room and board and

1 transportation.

2 **INMATE TITCH:** Right.

3 **DEPUTY COMMISSIONER ARMENTA:** So it's
4 actually a very favorable letter, and it's a
5 letter for housing. Now, I know I saw some
6 letters from a Mr. And Mrs. Delagarza
7 (phonetic), right?

8 **INMATE TITCH:** Yes, you did.

9 **DEPUTY COMMISSIONER ARMENTA:** Right. Okay,
10 here we go.

11 Five years ago we were introduced to
12 Mark in the visiting room as we visited
13 other inmates there as well. We have
14 continued to see Mark and talk with him
15 over the past five years. He's a very
16 intelligent man and a delight to visit
17 with him. Despite all the years he's
18 been incarcerated, he maintains a
19 positive attitude and has worked
20 diligently to overcome his childhood
21 abuses, and has developed into a fine
22 man who deeply regrets his past
23 mistakes. He not only has worked to
24 better himself, earn a high school
25 diploma, and nearly completed a degree
26 in business administration from Chapman
27 University.

1 Now, you do have your AA from there?

2 **INMATE TITCH:** Yes, I do.

3 **DEPUTY COMMISSIONER ARMENTA:** Okay. "And
4 has helped so many of his peers and has earned
5 their respect and admiration. He continues to
6 study and further his education." Basically,
7 they talk about your chronos, all the positive
8 things that you've done, and during the long
9 years he's had very little support from the
10 outside. "Despite all of that, he's become
11 responsible and not the very troubled young man
12 he was many years ago. We understand that Mark
13 has a job offer, a place to live, along with
14 transportation." So this is a letter of
15 support.

16 **INMATE TITCH:** Yes.

17 **DEPUTY COMMISSIONER ARMENTA:** And they feel
18 you would be a very productive person. Okay.
19 Let's go over what you've been doing in prison.

20 **INMATE TITCH:** Okay.

21 **DEPUTY COMMISSIONER ARMENTA:** Actually, I
22 should say let's go over what you've been doing
23 since your last hearing, but we like to cover
24 the whole time.

25 **ATTORNEY CORYN:** It's a long time, 30 years
26 almost.

27 **DEPUTY COMMISSIONER ARMENTA:** I know, but

1 he's also done quite a lot. You did get your
2 GED, right?

3 **INMATE TITCH:** Yes, I did.

4 **DEPUTY COMMISSIONER ARMENTA:** Were you down
5 in Salinas at that time?

6 **INMATE TITCH:** Yeah, Soledad.

7 **DEPUTY COMMISSIONER ARMENTA:** Soledad,
8 yeah. Then after that you received your AA?

9 **INMATE TITCH:** Yes.

10 **DEPUTY COMMISSIONER ARMENTA:** You also took
11 some credits from San Jose State?

12 **INMATE TITCH:** Yeah, that was when I was at
13 Soledad.

14 **DEPUTY COMMISSIONER ARMENTA:** Yeah.

15 **INMATE TITCH:** And I transferred to
16 California Men's Colony in San Luis Obispo.
17 That's where I got my AA degree, Chapman --

18 **DEPUTY COMMISSIONER ARMENTA:** Chapman.

19 **INMATE TITCH:** -- University, as well as
20 other credits towards a BS/BA.

21 **DEPUTY COMMISSIONER ARMENTA:** Right. When
22 you take those courses who pays for them?

23 **INMATE TITCH:** Well, this --

24 **DEPUTY COMMISSIONER ARMENTA:** You do?

25 **INMATE TITCH:** No, half was paid by the
26 state, and half was paid by a federal grant.

27 **DEPUTY COMMISSIONER ARMENTA:** Federal

1 grant?

2 **INMATE TITCH:** Yeah, you had to maintain a
3 certain GPA in order to --

4 **DEPUTY COMMISSIONER ARMENTA:** You had over
5 a 3.0?

6 **INMATE TITCH:** Yes.

7 **DEPUTY COMMISSIONER ARMENTA:** You were
8 probably getting grades there that you did never
9 get in your life?

10 **INMATE TITCH:** No, you're right.

11 **DEPUTY COMMISSIONER ARMENTA:** Just
12 recently.

13 **INMATE TITCH:** Actually, there and Soledad
14 actually. Even in high school kind like a --
15 that's what motivated me. I remember I used to
16 ask my teacher all the time how come I couldn't
17 do this on the streets. And he said, well, the
18 answers just weren't there, you know, but --

19 **DEPUTY COMMISSIONER ARMENTA:** Yeah.

20 **INMATE TITCH:** -- it seemed real easy then.

21 **DEPUTY COMMISSIONER ARMENTA:** You been
22 involved in some training. I have you down for
23 having taken courses in vocational drafting.

24 **INMATE TITCH:** Yes.

25 **DEPUTY COMMISSIONER ARMENTA:** And office --
26 is it vocational office clerk?

27 **INMATE TITCH:** No.

1 **DEPUTY COMMISSIONER ARMENTA:** No?

2 **INMATE TITCH:** That's a vocational
3 procurement clerk. Actually, that's not a
4 trade.

5 **DEPUTY COMMISSIONER ARMENTA:** That's where
6 you worked?

7 **INMATE TITCH:** That's where I worked.

8 **DEPUTY COMMISSIONER ARMENTA:** Yeah.

9 **INMATE TITCH:** For five years, yes.

10 **DEPUTY COMMISSIONER ARMENTA:** Yeah, you did
11 that too?

12 **INMATE TITCH:** Yes.

13 **DEPUTY COMMISSIONER ARMENTA:** Well, you've
14 been a clerk for many years, weren't you?

15 **INMATE TITCH:** Actually, I was a clerk for
16 five years at CMC, and then I've been a clerk
17 here for five years.

18 **DEPUTY COMMISSIONER ARMENTA:** Yeah, that's
19 10 years.

20 **INMATE TITCH:** Yeah. I mean -- five years,
21 excuse me, a year.

22 **DEPUTY COMMISSIONER ARMENTA:** A year.
23 Okay. Because you worked in the --

24 **INMATE TITCH:** I worked in --

25 **DEPUTY COMMISSIONER ARMENTA:** -- IDL?

26 **INMATE TITCH:** Yeah, I worked in printing
27 when I was at CMC for 10 years.

1 DEPUTY COMMISSIONER ARMENTA: No, printing?

2 INMATE TITCH: Yes.

3 DEPUTY COMMISSIONER ARMENTA: With the PIA?

4 INMATE TITCH: Yes. And then I worked in
5 IDL here for five years.

6 DEPUTY COMMISSIONER ARMENTA: Okay.

7 INMATE TITCH: In construction.

8 DEPUTY COMMISSIONER ARMENTA: Yep, you've
9 been in printing.

10 INMATE TITCH: Yeah.

11 DEPUTY COMMISSIONER ARMENTA: Machine
12 operator?

13 INMATE TITCH: Yes.

14 DEPUTY COMMISSIONER ARMENTA: Yeah.

15 INMATE TITCH: One of the best.

16 DEPUTY COMMISSIONER ARMENTA: Huh?

17 INMATE TITCH: One of the best.

18 DEPUTY COMMISSIONER ARMENTA: Did you do
19 this?

20 INMATE TITCH: No.

21 DEPUTY COMMISSIONER ARMENTA: No?

22 INMATE TITCH: No, she bought it.

23 DEPUTY COMMISSIONER ARMENTA: Oh, she
24 bought it?

25 INMATE TITCH: It's nice stuff though, huh?

26 DEPUTY COMMISSIONER ARMENTA: I was going
27 to say, my gosh.

1 **INMATE TITCH:** Excellent paper right there.

2 **DEPUTY COMMISSIONER ARMENTA:** How did she
3 manage --

4 **INMATE TITCH:** That's parchment paper right
5 there.

6 **DEPUTY COMMISSIONER ARMENTA:** I was going
7 to say where did you get the computer.

8 **INMATE TITCH:** Yeah.

9 **DEPUTY COMMISSIONER ARMENTA:** Yes, she did
10 a good job.

11 **INMATE TITCH:** Yes. That was presented by
12 Lenona Carlburg.

13 **DEPUTY COMMISSIONER ARMENTA:** Okay. It
14 says here that you -- okay. I did mention
15 drafting?

16 **INMATE TITCH:** Yes.

17 **DEPUTY COMMISSIONER ARMENTA:** You did take
18 part in that?

19 **INMATE TITCH:** Yes.

20 **DEPUTY COMMISSIONER ARMENTA:** Okay. And
21 press operator?

22 **INMATE TITCH:** Yes.

23 **DEPUTY COMMISSIONER ARMENTA:** You've talked
24 about that. That's one of your skills. And you
25 were a procurement clerk. You got experience in
26 that. And part of your work you've also been
27 like a teacher's aid?

1 **INMATE TITCH:** Yes, I was a teacher's aid
2 in vocational auto body.

3 **DEPUTY COMMISSIONER ARMENTA:** Okay. Did
4 you also work in the yard crew?

5 **INMATE TITCH:** Yes, that was when I was at
6 CMC, the last six months or nine months before I
7 left there. I believe there was some work-
8 related chronos in there that --

9 **DEPUTY COMMISSIONER ARMENTA:** We'll get to
10 those.

11 **INMATE TITCH:** Okay. I'm sorry.

12 **DEPUTY COMMISSIONER ARMENTA:** They're very
13 important.

14 **INMATE TITCH:** Yeah.

15 **DEPUTY COMMISSIONER ARMENTA:** They're also
16 very important. That's where we get --

17 **INMATE TITCH:** Well, they summarize the
18 skills.

19 **DEPUTY COMMISSIONER ARMENTA:** The skills,
20 yeah.

21 **INMATE TITCH:** Yeah.

22 **DEPUTY COMMISSIONER ARMENTA:** I've went
23 over all your letters. I've went over all your
24 efforts --

25 **INMATE TITCH:** Yeah.

26 **DEPUTY COMMISSIONER ARMENTA:** -- of sending
27 out your letters to different companies. Very

65

1 impressive to me that you've -- you looked into

2 AA?

3 INMATE TITCH: Yes.

4 DEPUTY COMMISSIONER ARMENTA: In other
5 words, whenever you get a date you go right
6 there and --

7 INMATE TITCH: I'll know exactly where
8 they're --

9 DEPUTY COMMISSIONER ARMENTA: Where to go?

10 INMATE TITCH: Where the meetings are.

11 DEPUTY COMMISSIONER ARMENTA: Yeah. And
12 like we said earlier, you mentioned that you
13 took courses and you got your high school
14 diploma?

15 INMATE TITCH: Yes.

16 DEPUTY COMMISSIONER ARMENTA: You went to
17 Hartnell College?

18 INMATE TITCH: Yes.

19 DEPUTY COMMISSIONER ARMENTA: That was in
20 Soledad, and also there at San Jose State?

21 INMATE TITCH: Yeah.

22 DEPUTY COMMISSIONER ARMENTA: You got 24
23 credits?

24 INMATE TITCH: Out of there, yeah.

25 DEPUTY COMMISSIONER ARMENTA: Out of San
26 Jose State?

27 INMATE TITCH: Yeah.

1 **DEPUTY COMMISSIONER ARMENTA:** Was that back
2 in 1981?

3 **INMATE TITCH:** That was in 19 -- yeah, that
4 would of been right around there, '80, '81.

5 **DEPUTY COMMISSIONER ARMENTA:** I kind of
6 remember because I was going through your file -
7 -

8 **INMATE TITCH:** Yeah.

9 **DEPUTY COMMISSIONER ARMENTA:** -- and
10 remember some of those dates. Okay. Chapman,
11 you got a 3.8, huh?

12 **INMATE TITCH:** Yeah.

13 **DEPUTY COMMISSIONER ARMENTA:** Wow. We got
14 your certificates here. I'll tell you many
15 people wish they had a 3.8.

16 **INMATE TITCH:** Yeah, that's a lot of hard
17 work.

18 **DEPUTY COMMISSIONER ARMENTA:** I have to
19 admit I only got a 3.5.

20 **INMATE TITCH:** Oh, really?

21 **DEPUTY COMMISSIONER ARMENTA:** Yeah, that's
22 a highest.

23 **INMATE TITCH:** That's still good.

24 **DEPUTY COMMISSIONER ARMENTA:** Not 3.8.

25 **INMATE TITCH:** But if you get what you
26 wanted from it --

27 **DEPUTY COMMISSIONER ARMENTA:** Yeah.

1 **INMATE TITCH:** -- that's what counts, you
2 know. You can have all the grade point
3 averages, but if you don't get what you want, it
4 won't amount to much.

5 **DEPUTY COMMISSIONER ARMENTA:** Then of
6 course all your letters -- your letters of you
7 making the honor roll at Chapman.

8 **INMATE TITCH:** Right.

9 **DEPUTY COMMISSIONER ARMENTA:** You must of
10 felt very good?

11 **INMATE TITCH:** Yeah, I was very proud.

12 **DEPUTY COMMISSIONER ARMENTA:** You have your
13 certificate of completion from vocational
14 drafting and also from a confined space
15 awareness training?

16 **INMATE TITCH:** Yes, that's from IDL.

17 **DEPUTY COMMISSIONER ARMENTA:** Forklift
18 operator. You were even -- gosh, you were even
19 in first aid?

20 **INMATE TITCH:** Yeah.

21 **DEPUTY COMMISSIONER ARMENTA:** Long time
22 ago. And again we have a list of all your
23 different courses, and I have looked in your C
24 file. You participated in a self confrontation
25 workshop?

26 **INMATE TITCH:** Yes.

27 **DEPUTY COMMISSIONER ARMENTA:** 24 hour

1 biblical counseling partnership program
2 requiring 10 to 12 hours per week, personal
3 study, and assignments. And also in the M-2,
4 Match Two program?

5 **INMATE TITCH:** Yes.

6 **DEPUTY COMMISSIONER ARMENTA:** The program
7 matching a volunteer with an inmate for regular
8 visits and contacts to promote growth towards
9 fulfilling life in the community. You've been
10 involved in creative conflict resolution. You
11 know about that one?

12 **INMATE TITCH:** Yes.

13 **DEPUTY COMMISSIONER ARMENTA:** Forty days of
14 purpose, six week study based on the book
15 "Purpose Driven Life". Who put on that class?
16 That's recent, too.

17 **INMATE TITCH:** Yeah, it was -- gosh, I
18 can't remember the name. It was one of the guys
19 from the church.

20 **DEPUTY COMMISSIONER ARMENTA:** Okay. Also
21 in Kiros?

22 **INMATE TITCH:** Yeah Kiros, free at last,
23 and you also been a -- in the Laubach literacy
24 action program?

25 **INMATE TITCH:** Yep.

26 **DEPUTY COMMISSIONER ARMENTA:** Was that as a
27 tutor?

1 INMATE TITCH: Yes.

2 DEPUTY COMMISSIONER ARMENTA: And the 12
3 step program?

4 INMATE TITCH: Yeah, (indiscernible).

5 DEPUTY COMMISSIONER ARMENTA:

6 (Indiscernible), yep. Did you learn your steps?

7 INMATE TITCH: 12 steps, yeah.

8 DEPUTY COMMISSIONER ARMENTA: Yeah.

9 INMATE TITCH: Yeah.

10 DEPUTY COMMISSIONER ARMENTA: I won't ask
11 you all, I'll ask you number eight.

12 INMATE TITCH: Made a list of the people
13 who we have harmed and became willing to make
14 amends to them all.

15 DEPUTY COMMISSIONER ARMENTA: Make amends,
16 yeah. And the only reason I know that is
17 because that seems to be the one that they all
18 ask.

19 INMATE TITCH: Oh, really?

20 DEPUTY COMMISSIONER ARMENTA: Number eight.

21 INMATE TITCH: I think they asked me that
22 in '95 or something like that. I knew that one.

23 DEPUTY COMMISSIONER ARMENTA: You got your
24 certificates here for all that. So you've been
25 keeping busy?

26 INMATE TITCH: Yes.

27 DEPUTY COMMISSIONER ARMENTA: Also hands of

1 peace, conflict resolution?

2 **INMATE TITCH:** Yeah, those are the -- I
3 included the certificates because those are
4 something that you don't get to see in the C
5 file, you just get the chrono.

6 **DEPUTY COMMISSIONER ARMENTA:** You know,
7 there was some in there, but not -- they were
8 not all in there.

9 **INMATE TITCH:** No, I know.

10 **DEPUTY COMMISSIONER ARMENTA:** Yeah. In
11 some institutions they have them all.

12 **INMATE TITCH:** Oh, really?

13 **DEPUTY COMMISSIONER ARMENTA:** Yeah. I can
14 open it and go to the third section and they're
15 all in there.

16 **INMATE TITCH:** Oh, really?

17 **DEPUTY COMMISSIONER ARMENTA:** And they're
18 right there. Right now I was looking for them.
19 For our purposes just the fact that we see them.

20 **INMATE TITCH:** Right.

21 **DEPUTY COMMISSIONER ARMENTA:** And always
22 keep this copy. If you're going to give them
23 one give them a Xerox.

24 **INMATE TITCH:** Right.

25 **DEPUTY COMMISSIONER ARMENTA:** Okay. Let's
26 get into your psychological report.

27 **INMATE TITCH:** Okay.

1 **DEPUTY COMMISSIONER ARMENTA:** It was
2 prepared by Dr. Preston. Under diagnostic
3 impression, there is no diagnosis an Axis I.
4 Axis II: Antisocial Personality Disorder.
5 Under Axis III: Hepatitis. Axis IV: Your
6 Stress, it says due to Being Incarcerated. It
7 gives you a favorable functional score of 85.
8 In terms of whether they consider you a threat,
9 this is what they write, Section 14, assessment
10 of dangerousness. It is, "My opinion is that
11 Mr. Titch poses a less than average risk of
12 violence in the structured setting as compared
13 to other inmates in this institution. Support
14 for this opinion is based upon his programming
15 history, which is quite positive for many years.
16 Mr. Titch has not received a CDC 115 since 1986.
17 He participated in self-help and is employed in
18 a position of responsibility working for a
19 correctional lieutenant. In the event of
20 release to the community, it is my opinion that
21 he will continue to present a less than average
22 risk of violent behavior. The real issue of
23 antisocial personality disorder boils down to
24 whether the individual has developed a sense of
25 self control and conscience, such as they
26 maintain a pro-social lifestyle and do not
27 engage in crime, be it white collar crime or

1 street crime. It appears that Mr. Titch has
2 begun to solidify some plans for his survival in
3 the community in the event of release. These
4 plans include forming connections with friends
5 and relatives with viable employment offers.
6 With the passage of time Mr. Titch continues to
7 accumulate a record of programming, which points
8 towards a diminished propensity of criminal
9 behavior. It is always difficult to make an
10 assessment with regards to how long an
11 individual must be observed in a controlled
12 setting before the time comes when his release
13 into the less controlled setting poses an accept
14 level of risk. It is my feeling that as long as
15 Mr. Titch continues to program positively and
16 continue to upgrade his parole plans and level
17 of support in the community, he is moving
18 towards the point of time in which that risk may
19 be acceptable. I do not believe that mental
20 health issues will necessarily be a deciding
21 factor in terms of deciding when Mr. Titch is
22 appropriate for parole." Okay. Sir, is
23 everything been covered?

24 **INMATE TITCH:** I think you covered
25 everything.

26 **DEPUTY COMMISSIONER ARMENTA:** Okay. I'm
27 sorry, one last thing. In the area of 115s, you

1 have a total of five.

2 **INMATE TITCH:** True.

3 **DEPUTY COMMISSIONER ARMENTA:** And none
4 since 1986.

5 **INMATE TITCH:** That would be February.

6 **DEPUTY COMMISSIONER ARMENTA:** February
7 23rd.

8 **INMATE TITCH:** Right.

9 **DEPUTY COMMISSIONER ARMENTA:** And you have
10 one 128, and that was for horse playing?

11 **INMATE TITCH:** Okay.

12 **DEPUTY COMMISSIONER ARMENTA:** Okay.

13 **PRESIDING COMMISSIONER DAVIS:** Since we're
14 there, let's talk about that real quick. You
15 haven't had a 115 since February of '86?

16 **INMATE TITCH:** Right.

17 **PRESIDING COMMISSIONER DAVIS:** But the 115s
18 that you had at that time were all, with the
19 exception of one, which was for alcohol.

20 **INMATE TITCH:** Right.

21 **PRESIDING COMMISSIONER DAVIS:** Were all
22 involving violence.

23 **INMATE TITCH:** Fighting.

24 **PRESIDING COMMISSIONER DAVIS:** Yeah.

25 **INMATE TITCH:** Yeah.

26 **PRESIDING COMMISSIONER DAVIS:** Okay. What
27 happened?

1 **INMATE TITCH:** Well, you didn't expect me
2 to come to prison and stay out of trouble, did
3 you?

4 **PRESIDING COMMISSIONER DAVIS:** Yeah.

5 **INMATE TITCH:** You did?

6 **PRESIDING COMMISSIONER DAVIS:** Actually,
7 you know it has been done on many, many
8 occasions.

9 **INMATE TITCH:** Well, that's --

10 **PRESIDING COMMISSIONER DAVIS:** Yeah.

11 **INMATE TITCH:** I don't know.

12 **PRESIDING COMMISSIONER DAVIS:** We do this a
13 lot, and there's a lot of people that sit on
14 that side of the table who don't have any 115s,
15 believe it or not. I mean, there's not a lot,
16 but there are --

17 **INMATE TITCH:** Yeah, there's not a lot.

18 **PRESIDING COMMISSIONER DAVIS:** -- but it
19 can be done.

20 **INMATE TITCH:** I would say --

21 **PRESIDING COMMISSIONER DAVIS:** I guess my
22 question is more --

23 **INMATE TITCH:** Some people can do it.

24 **PRESIDING COMMISSIONER DAVIS:** Yeah. I
25 guess my question is really not so much why you
26 were doing that originally because --

27 **INMATE TITCH:** Right.

1 **PRESIDING COMMISSIONER DAVIS:** -- I get it,
2 but what changed in '86?

3 **INMATE TITCH:** Well, I think I grew up. I
4 think I finally, you know, the light clicked on.
5 I said look, man, if I continue doing this I'm
6 never going to get out of here. I'm just going
7 to stay on level four all my life, and I won't
8 make it out of prison.

9 **PRESIDING COMMISSIONER DAVIS:** Can you
10 point to anything that made that decision appear
11 for you, or what happened?

12 **INMATE TITCH:** I think -- I think it was
13 just normal maturity. I think it took -- you
14 know, I always tell other lifers, you know,
15 there's a critical period when you're a lifer,
16 and that's your first seven years because on
17 your seventh year, I don't know what it is, but
18 for me anyways, that was a very critical year
19 for me. It was a make or break -- there was a
20 moment where I decided which way I was going to
21 go in life, and I decided to go the right way.

22 **PRESIDING COMMISSIONER DAVIS:** Do you know
23 what -- can you attribute that to anything?

24 **INMATE TITCH:** You know, I really -- I
25 can't. If I have to attribute to --

26 **PRESIDING COMMISSIONER DAVIS:** You don't
27 have to. I'm just curious to know if you

1 thought about it.

2 **INMATE TITCH:** If I have to attribute it to
3 anything, I would probably say it was probably
4 because of the people in my life, meaning my
5 friends, many of the people that I knew in the,
6 you know, in the Department of Corrections, the
7 teachers, my supervisors and stuff like that
8 because I was a pretty angry hostile person back
9 then, and I was pretty hopeless as far as doing
10 the program and stuff like that. And I think
11 had it not been for their encouragement to go on
12 and to hang in there, yeah, I don't think I
13 would of made it. In fact, I often wonder if I
14 came in the Department of Corrections today
15 whether I would of changed. I don't think I
16 would of because all of those systems have been
17 eliminated now, you know, they're gone. You
18 don't have the people they used to. I mean, I
19 was an -- I was an idiot, and these guys went
20 out of their way to say, hey, you know what, it
21 ain't over for you. It's your choice still.
22 You can still do something with your life if you
23 want to, but you got to do it, and I didn't
24 deserve it. I mean, like I said, I was
25 arrogant. I was a loud mouth. You know, I look
26 back really now, and I'm really ashamed. I wish
27 I could back and see some those people and

1 apologize to them and tell them -- and thank
2 them that they didn't give up on me. I don't
3 know what they seen in me, but some of them seen
4 a spark of light in me somewhere, you know,
5 where I didn't see it, and that made a big
6 difference in my life, and I never forgot that.
7 I've never forgotten the people who stopped to
8 help me along the way, you know. Now, it's more
9 of just wanting to prove to them, you know that
10 I'm not going to let them down.

11 **PRESIDING COMMISSIONER DAVIS:** Mr. Armenta,
12 do you have any questions?

13 **DEPUTY COMMISSIONER ARMENTA:** Yes. Do you
14 think that going to school and working towards
15 your AA and getting those high grades had
16 something to do with that big turnaround?

17 **INMATE TITCH:** Oh, absolutely.

18 **DEPUTY COMMISSIONER ARMENTA:** Yeah, where
19 you saw yourself --

20 **INMATE TITCH:** Oh, absolutely.

21 **DEPUTY COMMISSIONER ARMENTA:** Yeah.

22 **INMATE TITCH:** You know, I'm not sure if it
23 was going to school, although, you know --
24 although, I think -- I think one of the critical
25 moments when I found out that I wasn't stupid --
26 you got to remember that when I grew up I used
27 to think I was retarded because of the way I

1 grew up. Because I was placed in juvenile hall,
2 and I missed valuable school time. And then
3 when I got back out and went to school, you
4 know, public school was, you know, when you
5 entered the fourth grade or fifth grade they
6 started at a certain level and they kept on
7 going throughout the year, right. Well, when
8 you miss six months and then you get put into
9 the middle of that you don't understand because
10 you missed -- you've already missed all the
11 basics. And I used to think that I was really
12 retarded. And going to school -- when I went to
13 San Jose State University and I maintained in an
14 upper graduate program I maintained A and Bs, it
15 dawned on me that I could do this. All I had to
16 do was commit myself. It was through
17 dedication. But I think too one of the most
18 significant things that really helped was my
19 work environment. PIA was a very, very critical
20 time. You know, I was one of the -- you seen
21 some of the chronos. I was one of their best
22 pressmen there, and you know, I learned the
23 printing field from the floor up. I went in
24 there, I started out, I didn't know nothing. I
25 started out as a collator. I got on a folding
26 machine. I got on a collating machine. Then I
27 got on a little small press, and then I started

1 learning how to repair them. Then I got on a
2 big press, and a lot of this stuff is very
3 technical. It's very intimidating. I mean, I
4 can remember when my bosses said hey, you're on
5 your own. It's time for you to put up now, you
6 know what I mean. And I can remember being very
7 intimidated, but as I succeeded, I can remember
8 the sense of accomplishment. It was just
9 enormous. I mean, to be left alone with a piece
10 of a machinery that costs a quarter of a million
11 dollar and your boss says hey, go ahead I trust
12 you. That's pretty significant, so --

13 **PRESIDING COMMISSIONER DAVIS:** Okay. Tell
14 me what you learned on your class on your
15 "Purpose Driven Life".

16 **INMATE TITCH:** "Purpose Driven Life."

17 **PRESIDING COMMISSIONER DAVIS:** What -- do
18 you remember the main theme of the book?

19 **INMATE TITCH:** Yeah, finding your purpose
20 in life. And I think to me what I got out of
21 the course was that our purpose is to reflect
22 God's glory in our daily lives, and that means
23 you don't have to do something -- you don't have
24 to accomplish something big, you know what I
25 mean, or you don't have to go out and become a
26 multimillionaire or something like. But what
27 I'm saying is that you reflect God's glory by

1 getting up in the morning, by smiling, by being
2 positive, not being negative, not being a cry
3 baby or a complainer, and you know, and trying
4 to do good things in life in spite of your
5 circumstances. To me, that's what I got out of
6 that. That's the "Purpose Driven Life."

7 **PRESIDING COMMISSIONER DAVIS:** And how do
8 you think that applies to you?

9 **INMATE TITCH:** I think I've done
10 exceptionally well, but I think I've been
11 exceptionally blessed too, you know. I think
12 I've had good people around me who have
13 influenced me to do the right thing. I'm just
14 so grateful and thankful that I've had those
15 people in my life. And you know, I'll tell you
16 what, I think I've had angels look out for me.
17 I really do because it's so easy to do bad, and
18 it's so easy to cross that line on to the bad
19 side. And for some reason, you know, even when
20 there was a lot of turmoil around me, even
21 temptation, there was a lot of temptation, I
22 always said no. I'm not going to step over that
23 line. And I honestly think that's because
24 somebody was looking out for me and all the good
25 people that I've had in any life. I really do.

26

27 **PRESIDING COMMISSIONER DAVIS:** Commissioner

1 Armenta asked you about step eight of the
2 Alcoholics Anonymous, and you were articulate
3 what that -- what step eight entails, have you
4 done it?

5 **INMATE TITCH:** Yes, but step nine says
6 accept when to do so would injure them or
7 others. So there's only, you know, when you're
8 talking about murder -- I remember I was sitting
9 in my 1995 hearing, and I remember talking to
10 the Board members there. And I remember I asked
11 -- I said hey, would you convey this to the
12 District Attorney, you know, I would like to
13 send money or do whatever I can, you know. And
14 it was conveyed to me that, you know what, those
15 people probably don't want to hear from you
16 anymore because, you know, the devastation that
17 you create and the sorrow. So I think --

18 **PRESIDING COMMISSIONER DAVIS:** Yeah, and
19 many people write that -- use that time to write
20 that letter, but it's really for you as well.

21 **INMATE TITCH:** Yeah.

22 **PRESIDING COMMISSIONER DAVIS:** So have you
23 done that?

24 **INMATE TITCH:** Yes. I don't think I've
25 written the letter, but I think what I've done
26 is I've talked to my close friends about it, and
27 I've also said a lot of prayers too. And I

1 think in making amends, you know, I may not be
2 able to make amends to them personally, but I
3 can make amends by doing other things. And
4 that's why being a more responsible person,
5 giving back to the, you know, to the prison when
6 I could. For example, they had these child
7 abuse -- where we raise funds for child abuse,
8 the literacy council where I helped other
9 inmates to learn how to read and write.
10 Printing, you know, I was teaching people -- I
11 was giving them a trade, you know, I was
12 teaching how to run presses and stuff like that.
13 So that's how I make amends. You know, I can't
14 make -- I can't undo what I've done. I was an
15 idiot, and that will -- the harm of that will be
16 forever, but what I can do is be a better person
17 and make sure that my tomorrows are bright.

18 **PRESIDING COMMISSIONER DAVIS:** And it's --
19 I understand what you're saying. And sometimes,
20 although -- it's my understanding is that part
21 of the program is that if the letter is somewhat
22 cathartic for you as well that sometimes help
23 you. By putting things down on paper maybe you
24 bring out some things that conversation doesn't,
25 so it's a -- part of it is a process for you as
26 well.

27 **INMATE TITCH:** That's interesting that you

1 should say that because I was just thinking
2 about that. I was talking to somebody about it
3 actually, but you know, step four in Alcoholics
4 Anonymous is make a searching and fearless moral
5 inventory. And I tell you what, one of the
6 hardest things that I had ever had to do was sit
7 there and read that package, you know, page
8 after just page of just page of all the horrible
9 things that I did. Some of them aren't true,
10 you know, but a lot of them are. There are a
11 lot of victims, and you know, it's really just
12 burned me to the soul, you know, to have to do
13 that.

14 **PRESIDING COMMISSIONER DAVIS:** Commissioner
15 Armenta, do you have any other questions?

16 **DEPUTY COMMISSIONER ARMENTA:** No, I do not.

17 **PRESIDING COMMISSIONER DAVIS:** All right.
18 Mr. Ferrentino?

19 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** Yes.
20 I would ask the Commissioner to ask the inmate
21 in talking about his psychological background
22 all the way to 1986 and 1989 he was diagnosed
23 with antisocial personality behavior with
24 sadistic features, and Dr. Chandler's (phonetic)
25 report from May -- June of 2000. Dr. Chandler
26 noted the sadistic, callous and cruel nature of
27 his crimes requires continued and additional

1 personal growth and resolution of underlying
2 psychological factors prior to his being
3 released. In '86 and '89 he was recommended to
4 attend a Category X program, and I don't see any
5 addressing by the inmate of any of the
6 psychological factors up to this point. I would
7 like to ask him why he hasn't taken advantage of
8 those recommendations.

9 **PRESIDING COMMISSIONER DAVIS:** Do you
10 understand the question?

11 **INMATE TITCH:** Yes.

12 **PRESIDING COMMISSIONER DAVIS:** Why haven't
13 you?

14 **INMATE TITCH:** Well, there is no Category
15 X, first of all. And second of all, there
16 really isn't any Cat T program anymore, and
17 there isn't very many self-help groups.
18 Whatever is available, I take.

19 **PRESIDING COMMISSIONER DAVIS:** And what
20 have you taken since that time?

21 **INMATE TITCH:** Well, primarily AA, but I've
22 also taken the self confrontation workshop.
23 I've taken conflict resolution, which how to
24 deal with anger.

25 **PRESIDING COMMISSIONER DAVIS:** But that
26 would also include the AA/NA, the 12 steps?

27 **INMATE TITCH:** Yes.

1 **PRESIDING COMMISSIONER DAVIS:** The
2 literacy, the free at last, the Kiro, 40 days
3 of purpose, creative conflict resolution, self
4 confrontation workshop and the M-2 program?

5 **INMATE TITCH:** Right.

6 **PRESIDING COMMISSIONER DAVIS:** Okay. Did
7 you do the "Purpose Driven Life" part also?

8 **INMATE TITCH:** Yeah.

9 **PRESIDING COMMISSIONER DAVIS:** All right.

10 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** I
11 guess my question was more back when those --
12 when Category X was available why was that not
13 taken advantage of at the time?

14 **PRESIDING COMMISSIONER DAVIS:** Okay.

15 **INMATE TITCH:** I think primarily that at
16 that time that I was -- I remember one time they
17 asked me if I wanted to take it, and I said no
18 at that time because I was going to school and I
19 had work and I had a lot of stuff. And I always
20 thought there was going to be time to take those
21 things. I had -- I don't think anybody
22 envisioned how prison has changed as to what it
23 has changed to now.

24 **PRESIDING COMMISSIONER DAVIS:** You were
25 still getting your 115s in '86 too?

26 **INMATE TITCH:** Yes.

27 **PRESIDING COMMISSIONER DAVIS:** Okay.

1 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** This
2 may be an area where Counsel may not want the
3 inmate to answer, but there --

4 **ATTORNEY CORYN:** If it's anything related
5 to the offense, no.

6 **DEPUTY DISTRICT ATTORNEY FERRENTINO:**
7 There's some clarification and corrections that
8 were made in the report by the inmate and spoken
9 about by the inmate with regard to what happened
10 previously, in the previous offenses. And in
11 the previous offenses up until about 1992 the
12 inmate had accepted responsibility solely for
13 the offenses in the April 1978 report, in the
14 January '83 report, in the February 1989 report,
15 and then in 1992 and afterwards, including this
16 report, the inmate is now pointing to the fact
17 that he was influenced or did these crimes as a
18 part of the influence of his partner. I'm
19 wondering what had changed from those previous
20 admissions of sole responsibility to up from
21 1992 to the present they were -- where the
22 inmate appears to be shifting some of the blame
23 to his partner?

24 **PRESIDING COMMISSIONER DAVIS:** Okay. And
25 Counsel, feel free to weigh in on any part of
26 this, but --

27 **INMATE TITCH:** I'll answer that.

1 **PRESIDING COMMISSIONER DAVIS:** -- to the
2 extent that you want to answer that.

3 **INMATE TITCH:** Well, that's really
4 addressed here in my report, my mental health
5 evaluation report where the doctor -- you know,
6 I talked to the doctor here about my crimes. It
7 says review of life crime, and he did -- he said
8 right here that he didn't think that I was
9 trying to blame anybody, and I don't. I really
10 don't, you know. It was my decision, so I take
11 full responsibility for that. I think what I'm
12 trying to say, you know, what I'm getting -- and
13 he's new. I've never seen this particular
14 District Attorney here, but what I'm getting is
15 that it seems like the facts of my crimes are
16 beginning to change, and that's starting to
17 concern me really. I mean, in the police letter
18 that you read from the police department, the
19 sergeant, the police sergeant said that I shot
20 Aubrey Duncan, okay, and here -- these are my
21 original court papers. The information sheet
22 when I was first arrested, and it says right
23 here, you know, in my charges that I was charged
24 with that murder. However, it says it is
25 further alleged that at the time of the
26 commission of the commitment offense alleged in
27 count 16 of this information the defendant Brett

1 Thomas was armed with the deadly weapon, to wit
2 a rifle. It is further alleged that at the time
3 the commission of the offense allegedly count 16
4 the defendant Brett Thomas used a firearm, to
5 wit a rifle. It doesn't say where Mark Titch
6 used a rifle. So I just, you know, a long time
7 has gone by. Mistakes happen, but I just happen
8 to notice that a lot of things are starting to
9 change, and it seems to me the better I do the
10 worse these crimes start to get, you know. I
11 notice in the letter from the District Attorney
12 Pierce (phonetic) where in the beginning they
13 were saying that Laura Straughton was praying
14 for her life. Now that's changed to begging for
15 her life. And of course, with the attempted
16 rape, you know, I was never charged with any
17 rape. They don't have any evidence of that.
18 They're free to bring, you know, they're free to
19 present any kind of evidence, you know. My --

20 **PRESIDING COMMISSIONER DAVIS:** There's no
21 attempted rape listed in the charges.

22 **INMATE TITCH:** No, of course, no. But I
23 mean, it's stuff like that that really concerns
24 me. In the very beginning I would of never said
25 anything about this. I would of just kept my
26 mouth shut, took my lumps, and that's that, you
27 know. I understand that a lot of people are mad

1 at me. I don't expect people to forgive me, but
2 by the same token, you know, I'm not just going
3 to sit and let people run over me.

4 **PRESIDING COMMISSIONER DAVIS:** Okay. So
5 you're interested in clarifying the record?

6 **INMATE TITCH:** That's all. That's it.

7 **PRESIDING COMMISSIONER DAVIS:** Okay.

8 **INMATE TITCH:** That's -- hopefully that
9 will answer his question.

10 **PRESIDING COMMISSIONER DAVIS:** I've got
11 that.

12 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** I
13 have just one more question in that area,
14 whether the inmate want to answer or not, but
15 specifically in the 1978 report, psychological
16 report talking about Ms. Straughton, the inmate
17 indicated his action were the result of bitter
18 anger and said his actions satisfied his rage.
19 And now, in clarifications we have here it says,
20 "I was sole perpetrator. I had no
21 predisposition to commit this crime but was
22 induced by my crime partner in believing that
23 the killing of Laura Straughton would prevent us
24 from being apprehended." So I understand the
25 inmate's position on the crimes being stated
26 correctly, but my question is to how do we have
27 such a drastic change as to accepting

1 responsibility from back then to today's date?

2 **INMATE TITCH:** Well, I was a jerk back
3 then. I mean, you know, there's been a lot
4 changes that have taken place here. I'm not the
5 same person that I was -- when did you say that
6 was, 1978, '79?

7 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** Yes.

8 **INMATE TITCH:** I'm not that same person,
9 you know. I might of said that just to be a
10 smart alec to the psych, you know, that's what
11 kind of jerk I was back then, and I'm not that
12 person, you know. I'm trying to deal with this
13 as responsible a way that I know how, you know.
14 I haven't shirked any of my responsibility for
15 these crimes.

16 **PRESIDING COMMISSIONER DAVIS:** Okay.

17 **INMATE TITCH:** You know --

18 **PRESIDING COMMISSIONER DAVIS:** And just
19 continue to direct your answers to the Panel.

20 **INMATE TITCH:** Yeah. I haven't shirked any
21 of my responsibilities for these crimes.

22 **PRESIDING COMMISSIONER DAVIS:** All right.
23 That answers the question.

24 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** No
25 further questions.

26 **PRESIDING COMMISSIONER DAVIS:** All right.

27 Mr. Coryn?

1 **ATTORNEY CORYN:** No further -- no
2 questions.

3 **PRESIDING COMMISSIONER DAVIS:** All right.
4 Mr. Ferrentino, closing?

5 **DEPUTY DISTRICT ATTORNEY FERRENTINO:** Yes,
6 I would direct most of my comments to the
7 letter, which I have submitted, but based on the
8 crimes which were committed and Mr. Titch's
9 statements in the prior reports with regard to
10 him accepting responsibility and then later now
11 placing blame on his crime partner, as well as
12 the extensive psychological background
13 indicating that he does have psychological
14 problems, which I don't see addressed anywhere
15 with the psychological team, the crime that he
16 committed were heinous and callous in nature.
17 The murder, which he himself inflicted on Ms.
18 Straughton, and as well as him being a
19 participant in the murder of Mr. Aubrey and the
20 wounding of his wife and also his daughter who
21 was murdered at the scene are callous and
22 malicious, and he's an unreasonable risk of
23 danger to society at any point. And I would
24 point to a paragraph in my letter where the
25 original judge, as well as the prosecutor in the
26 matter, felt it would be basically be tantamount
27 to murder for Mr. Titch to be ever released.

1 Also Senior Psychologist Howell (phonetic)
2 stated in her report of April of '78 the only
3 way society can be protected from this man would
4 to prevent from entering society. It's our
5 position that Mr. Titch should not have a date
6 set at this point, and that a new hearing not be
7 set for five years. With that I'll close.

8 **PRESIDING COMMISSIONER DAVIS:** All right.

9 Thank you. Mr. Coryn.

10 **ATTORNEY CORYN:** Mr. Titch did exercise his
11 right not to discuss the offense, his social or
12 criminal history. He's been to the Board eight
13 times before. He's had the facts of the case
14 rehashed over and over. He does accept
15 responsibility. The nature of the crimes
16 described by the Deputy District Attorney will
17 never change, and that should not be held
18 against him. What he did speak to today during
19 the hearing, Mr. Titch should be commended for
20 being open, frank, and candid regarding his
21 prior criminality, upbringing, his truancy, his
22 marijuana use. His post-conviction factors,
23 he's really programmed in a positive manner, and
24 he should be commended for being 115 free for 20
25 years. His accomplishments, he's upgraded
26 educationally. Vocationally, he has a number of
27 certificates. He's participated in numerous

1 self-help and therapy groups. I think the Board
2 spent a lot of time going over those, and what's
3 more important is that Mr. Titch is able to
4 articulate what he's learned in those groups
5 with the 12 step and with what he learned in his
6 "Purpose Driven Life", creative conflict
7 resolution and those classes. The psych report,
8 I disagree with the deputy District Attorney
9 again that last time he appeared before the
10 Board he received a three-year denial, a
11 stipulation to get a new psych report, and they
12 made certain recommendations, which Mr. Titch
13 complied with them all. Previous to that he
14 received -- after a hearing, I think I
15 represented him in 2001 at a lifer hearing, and
16 he received a two-year denial with certain
17 recommendation, and he complied with those. It
18 wasn't his fault that he didn't have a psych
19 report, but one finally got prepared for this
20 report by Dr. Preston for this hearing in July,
21 today's date. And it should be noted that the
22 report is favorable, supportive of release,
23 notices he has a GAF, Global Assessment of
24 Functioning Score of 85. It notes that he has
25 significant amount of insight, and his judgment
26 is good. His risk to society if released is
27 less than average. And he has solidified his

1 plans for survival in the community, which is
2 obviously very important, considering the length
3 of his confinement. Finally, Mr. Titch should
4 be commended for his parole plans. They're
5 solid, realistic, a number of letters of
6 support. He realizes the need to continue with
7 AA. He has an M-2 sponsor, and he should be
8 commended for having a job offer that is
9 concrete. I think there's a lot of factors in
10 mitigation. I would respectfully ask that this
11 Board consider them all in determining
12 suitability.

13 **PRESIDING COMMISSIONER DAVIS:** Thank you.
14 Now is your opportunity --

15 **DEPUTY COMMISSIONER ARMENTA:** We need to
16 change tapes.

17 **PRESIDING COMMISSIONER DAVIS:** We're going
18 to change tapes so we won't interrupt you in
19 mid-thought.

20 **INMATE TITCH:** All right.

21 (Off the Record)

22 **DEPUTY COMMISSIONER ARMENTA:** Okay. We are
23 on tape two, side A.

24 **INMATE TITCH:** Okay.

25 **PRESIDING COMMISSIONER DAVIS:** This is your
26 opportunity Mr. Titch, to go ahead and address
27 the Board now and tell us why you believe you're

1 suitable for parole.

2 **INMATE TITCH:** Okay. Well, first of all, I
3 just want to say that I'm sincerely sorry for
4 all the harm that I did. I've tried to show
5 that through all my behavior over the years.
6 That's really the only way that I can show that
7 I'm sorry, you know. Words don't -- words by
8 themselves don't do it without action, and I
9 think I've shown that. You know, the last time
10 I was at the hearing, I think it was at 2001. I
11 didn't come at my 2003 hearing. They asked me
12 why do you think you ought to get out. And I
13 remember, I was like, well, what do I say, you
14 know. And you know, I've had five years to
15 think about that, and I think it really comes
16 down to what a Board member told me way back in
17 '92 or '86, I forget, one of my hearings, but he
18 said it really comes down to a calculated risk.
19 And what he meant by that is, you know, people
20 that, as they mature and get older they're less
21 likely statistically, and this is proven too, to
22 commit crime. People who participate in
23 education are less likely to participate in
24 crime. People who get a trade are less likely
25 to participate in crime. And people with have
26 support and who have firm parole plans are less
27 likely. I mean, this is all proven

1 statistically, and I think I've done all of
2 those things to show that statistically I don't
3 present -- not a, you know, a high risk of
4 recidivism. There's no way -- you guys aren't
5 perfect. You guys can't read minds, so there's
6 no way that you can be absolutely sure. You
7 can't have a hundred percent records, but lifers
8 in themselves have a low recidivism rate. It's
9 like less than one percent, I believe. And, you
10 know, personally my own belief is that people
11 who do 15, 20 years, you know, they're not
12 coming back. I don't know what you guys think,
13 but I can tell you that from my own personal
14 experience of what I've seen in the past, you
15 know, most people that do that much time they're
16 done. They don't want no more, and that's where
17 I am, you know. I can't change the past. You
18 know, I was a jerk, you know, he said it. Some
19 of the things in the past, there's nothing I can
20 do to change that. I'm always going to be an
21 idiot. The things that I did will always be
22 cruel. I wish I could take them all back. I
23 wish with all my heart I could take all that
24 back but I can't, so all I can do is try to be a
25 better person, and that's what I'm trying to do.
26 And that's -- I wish I had something better to
27 tell you, but that's all I can tell you, and

1 that's my statement.

2 **PRESIDING COMMISSIONER DAVIS:** All right.

3 Thank you, very much. We're going to recess for
4 our deliberations.

5 **R E C E S S**

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1 CALIFORNIA BOARD OF PAROLE HEARINGS

2 D E C I S I O N

3 PRESIDING COMMISSIONER DAVIS: Let the
4 record reflect that all those previously
5 identified as being in the room have returned.
6 This is in the matter of Mark Titch, CDC number
7 B-89549. The Panel reviewed all information
8 received from the public and relied on the
9 following circumstances in concluding that the
10 prisoner is not suitable for parole and would
11 pose an unreasonable risk of danger to society
12 or a threat to public safety if released from
13 prison. We come to this conclusion first and
14 foremost by the commitment itself -- commitment
15 offenses themselves. The offenses were carried
16 out in a especially cruel and callous manner.
17 There were multiple victims attacked, injured,
18 and killed in separate instances. The offenses
19 were carried out in a dispassionate and
20 calculated manner. The offenses were carried
21 out in a manner which demonstrates an
22 exceptionally callous disregard for human
23 suffering, and the motive for the crimes were
24 very trivial in relation to the offenses. These
25 conclusions are drawn from the statements of
26 facts wherein, for reasons still best to him,
27 MARK TITCH B-89549 DECISION PAGE 1 7/19/06

1 the prisoner engaged in a crime spree that
2 involved murders, kidnap, robbery, and assault
3 with a deadly weapon on a police officer. With
4 regard to prior record, we find that there is an
5 escalating pattern of criminal conduct and
6 violence, a history of unstable and tumultuous
7 relationships, failed previous grants of parole,
8 and failed to profit to -- or failed to profit
9 from society's previous attempts to correct
10 criminality, such attempts including juvenile
11 probation, parole, juvenile camp, and CYA
12 commitments. With regard to behavior while
13 incarcerated, we find that there are two 128(a)
14 counseling chronos, the last of which was in
15 June of 2005, and five serious 115 disciplinary
16 reports, the last of which was in February of
17 '86, four of these for violence and one for
18 alcohol. And we have already talked about the
19 turnaround that occurred in 1986. The July 2006
20 report by -- psychological report by Dr.
21 Preston, we do not find that to be supportive,
22 and I will quote from the report itself. Where
23 it's under the assessment of dangerousness it
24 states, "It is my opinion that Mr. Titch
25 possesses a less than average risk of violence
26 in the structured setting as compared to other
27 **MARK TITCH B-89549 DECISION PAGE 2 7/19/06**

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1 inmates in this institution. Support for this
2 opinion is based on his programming history,
3 which is quite positive for many years. Mr.
4 Titch has not received a CDC 115 since 1986. He
5 is participating in self-help and is employed in
6 a position of responsibility working for a
7 correctional lieutenant. In the event of
8 release to the community, it is my opinion that
9 he will continue to present a less than average
10 risk of violent behavior," where she continue on
11 the following page. "The real issue with
12 antisocial personality disorder boils down to
13 whether the individual has developed a sense of
14 self control and conscience such that they
15 maintain a pro-social lifestyle and do not
16 engage in crime, be it white collar crime or
17 street crime. It appears that Mr. Titch has
18 begun to solidify some plans for his survival in
19 the community in the event of release. These
20 plans include forming connections with friends
21 and relatives and a viable employment offer.
22 With passage of time, Mr. Titch continues to
23 accumulate a record of programming, which points
24 towards a diminishing propensity towards
25 criminal behavior. It is always difficult to
26 make an assessment with regard to how long an
27 **MARK TITCH B-89549 DECISION PAGE 3 7/19/06**

1 individual must be observed in a controlled
2 setting before the time comes when his release
3 to a less controlled setting poses an acceptable
4 level of risk. It is my feeling that as long as
5 -- I'm sorry, it is my feeling that as long as
6 Mr. Titch continues to program positively and
7 continues to upgrade his parole plans and level
8 of support in the community, he is moving
9 towards a point in time in which that risk may
10 be acceptable. I do not believe that mental
11 health will necessarily be the deciding factor
12 in terms of deciding when Mr. Titch is
13 appropriate for parole." With regard to your
14 parole plans, we do find that you have
15 appropriate parole plans, and I think that you
16 have done an exceptional job in putting this
17 book together, and I commend you for that. We
18 don't often see that, but when we do, it speaks
19 volumes for the person who did prepare it, so we
20 appreciate your doing that. With regard to the
21 3042 notices, we note that the District Attorney
22 from Orange County is here in person by
23 representative and does oppose parole, as does
24 the Anaheim Police Department by letter, the
25 Anaheim Police Department being the law
26 enforcement agency responsible for the
27 **MARK TITCH B-89549 DECISION PAGE 4 7/19/06**

1 investigation of this crime. Nevertheless, we
2 do want to commend you for a variety of things,
3 including your -- I want to get to this so I
4 quote this correctly, including your
5 participation in AA, your vocational drafting,
6 your M-2 program, your self confidence workshop,
7 creative conflict resolution, 40 days of purpose
8 involving the "Purpose Driven Life", and I think
9 you were actually able to fairly well capture
10 the essence of that book, your work in Kiros,
11 free at last, the -- is it the Laubach L-A-U --

12 **INMATE TITCH:** Lauderbach (phonetic).

13 **PRESIDING COMMISSIONER DAVIS:** Lauderbach?

14 **INMATE TITCH:** Yeah, Lauderbach.

15 **PRESIDING COMMISSIONER DAVIS:** Okay.

16 Because it's spelled in here L-A-U-B-A-C-H, but
17 it's Lauderbach Literacy Action, in which I
18 think you were also a tutor, correct?

19 **INMATE TITCH:** Right.

20 **PRESIDING COMMISSIONER DAVIS:** And your 12
21 step program. And I was also impressed by your
22 ability to articulate the 12 step program. It's
23 obvious -- some people have been in the 12 step
24 program for 12 years and have one year of
25 experience. You obviously have taken the whole
26 process to heart and do have several years -

27 **MARK TITCH B-89549 DECISION PAGE 5 7/19/06**

1 have really taken that to heart and have several
2 years of experience. However, these positive
3 aspects of behavior do not outweigh the factors
4 for unsuitability, and in a separate decision
5 the Hearing Panel finds that you have been
6 convicted of murder, and it is not reasonable to
7 expect that a hearing would be granted during
8 the next two years. We come to this conclusion
9 by the fact that the offense was carried out in
10 a -- the offenses were carried out in a
11 especially cruel and callous manner. That there
12 were multiple victims attacked, injured and
13 killed in separate instances. The offenses were
14 carried out in a dispassionate and calculated
15 manner. The offenses were carried out in a
16 manner which demonstrates an exceptionally
17 callous disregard for human suffering, and the
18 motive for the crimes were very trivial in
19 relationship to the offenses. These conclusions
20 are drawn from the statement of facts wherein
21 the prisoner, for reasons still best known to
22 him, engaged in a crime spree that included
23 murders, kidnapping -- kidnap, robberies, and
24 assault with a deadly weapon on a police
25 officer. With regard to a previous record, we
26 find that there is an escalating pattern of
27 **MARK TITCH B-89549 DECISION PAGE 6 7/19/06**

1 criminal conduct and violence, history of
2 unstable and tumultuous relationships, a failure
3 of a previous grant of parole, and failure to
4 profit from society's previous attempts to
5 correct criminality, such attempts including
6 juvenile probation, parole, juvenile camp and
7 CYA commitments. There are two 128 counseling
8 chronos, the last of which was in June of 2005,
9 and five serious 115 disciplinary reports, the
10 last of which was in February of 1986. The
11 psychological report of July 2006 by Dr. Preston
12 was not supportive of release for all the
13 reasons read into the previous decision. We do
14 find that you do have appropriate parole plans.
15 With regard to 3042 notices, we note that the
16 District Attorney from Orange County is here in
17 person by representative and does oppose parole,
18 as does the Anaheim Police Department who
19 opposes parole by letter, the Anaheim Police
20 Department being the law enforcement agency that
21 was responsible for the investigation of this
22 crime. With regard to recommendations, the
23 Panel recommends that you become and remain
24 disciplinary free, that includes 128s and
25 everything, that you, as available, continue to
26 participate in self-help programs, and that you
27 **MARK TITCH B-89549 DECISION PAGE 7 7/19/06**

1 earn positive chronos. Commissioner, do you
2 have anything else that you would like to add?

3 **DEPUTY COMMISSIONER ARMENTA:** No.

4 **PRESIDING COMMISSIONER DAVIS:** All right.

5 With that, Mr. Titch, we do want to wish you the
6 best of luck. Continue on the path that you're
7 on. I know that it's difficult, but it's
8 something that you're just going to have to do.
9 And we are adjourned.

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23 **PAROLE DENIED TWO YEARS.**

24 **THIS DECISION WILL BE FINAL ON:** NOV 16 2006

25 **YOU WILL BE PROMPTLY NOTIFIED, IF PRIOR TO THAT**
26 **DATE, THE DECISION IS MODIFIED.**

27 **MARK TITCH B-89549 DECISION PAGE 8 7/19/06**

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CERTIFICATE AND
DECLARATION OF TRANSCRIBER

I, STACY WEGNER, a duly designated transcriber, PETERS SHORTHAND REPORTING, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total two in number and cover a total of pages numbered 1 - 104, and which recording was duly recorded at R.J. DONOVAN CORRECTIONAL FACILITY, SAN DIEGO, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING OF MARK TITCH, CDC NO. B-89549, ON JULY 19, 2006, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape to the best of my ability.

I hereby certify that I am a disinterested party in the above-mentioned matter and have no interest in the outcome of the hearing.

Dated November 7, 2006, at Sacramento, California.



STACY WEGNER
TRANSCRIBER
PETERS SHORTHAND REPORTING

EXHIBIT 47

Yellen v. Butler

FILED

FEB 23 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RECEIVED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIKE YELLEN,

Petitioner,

No. CIV S-01-2398 MCE GGH P

vs.

DIANE BUTLER, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

I. BACKGROUND

Petitioner is a state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 1, 2003, the district court granted petitioner's writ of habeas corpus application in part as to petitioner's due process claim that there was not sufficient evidence to support the 1999 decision finding him unsuitable for parole. It was also ordered that within thirty days of that order, petitioner was to be given a parole date, assuming his record remained substantially unchanged from the time of the 1999 hearing. The petition was denied in all other respects. Judgment was entered on October 2, 2003. On October 30, 2003, respondent filed a notice of appeal, and on October 31, 2003, respondent filed an application for stay of the order and judgment. Petitioner filed an opposition and motion for

1 immediate release on November 3, 2003, based on respondent's violation of the district court
2 order requiring respondent to set a parole date.¹ The parties have since filed further requests for a
3 ruling on their respective motions.²

4 By separate order on February 4, 2004, the district court granted respondent's
5 request for a stay of the order and judgment pending appeal without prejudice to a later decision
6 on petitioner's motion for release, and referred petitioner's motion for release to the undersigned.
7 That motion is before the court. In considering the motion, this court on February 5, 2004, issued
8 an order to show cause why the temporary stay granted on February 4, 2004, should not be
9 dissolved as moot due to respondent's apparent inconsistency in requesting a stay while the
10 Board of Prison Terms ("BPT") was acting to grant a parole date. Respondent filed a response
11 on February 17, 2004.

12 Respondent's response and petitioner's recent filings indicate the following
13 proceedings which have transpired since the judgment was entered. On December 23, 2003, the
14 BPT held a parole hearing in which it issued a proposed decision granting petitioner a parole
15 date.³ On February 10, 2004, the BPT disapproved the proposed decision after an en banc
16 hearing. Respondent's Response, filed February 17, 2004, Exhs. B, C. Although the printed
17 decision states that a re-hearing would be scheduled on the next available calendar, respondent
18 represents that in light of the court ordered stay, the BPT would not hold a re-hearing.

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21 ¹ Petitioner filed a renewed motion on January 5, 2004.

22 ² The snafu regarding respondent's initial and subsequent motions may stem in large
23 part from respondent counsel's failure to utilize the correct district judge initials. This is a MCE
case not a LKK case. Failure to identify the correct district judge can lead to distribution
problems including an unwarranted shelf-life for motions.

24 ³ Although the BPT found petitioner suitable for parole and stated it was setting a parole
25 date, an actual date was not given at that time. This decision was stamped "pending review and
26 approval." Petitioner's supplemental motion, filed January 28, 2004, Exh. A. See also
Petitioner's motion for immediate release, filed January 5, 2004, Exh. B (notifying petitioner that
the decision would be reviewed and if approved, a copy of the final decision would be sent to
petitioner within thirty days).

Having now reviewed the parties' filings, the court denies petitioner's motions for release, and recommends that the judgment in this case not be stayed and the stay entered February 4, 2004 be dissolved.

II. ISSUES TO BE DECIDED

Respondent professes initial confusion regarding the issues to be decided by the undersigned indicating that it should be "allowed to rely on the finality of this Court's grant of the stay," and that a release of petitioner would be inconsistent with a stayed judgment. Respondent would be correct if the stay had been intended to be final. However, as respondent observed, since the matter of considering petitioner's release would be inconsistent with a stayed judgment, it is only correct to view the previous grant of the stay as temporary, which was to be reconsidered at the time petitioner's motion for immediate release was considered. No other interpretation of the district judge's order would be logical.⁴ Therefore, both the potential release and continued stay are issues to be decided.

III. MAGISTRATE JUDGE'S JURISDICTION

This court must always be cognizant of its own jurisdiction to enter orders as opposed to Findings and Recommendations. See, 28 U.S.C. § 636(b)(1)(A) and § 636(b)(1)(B). The instant case was referred for all purposes to the undersigned pursuant to Local Rule 302 of the Eastern District of California. E.D. Local Rule 72-302(c)(17). That Local Rule has been universally interpreted in this district as requiring magistrate judges to initially adjudicate all aspects of a prisoner's habeas corpus case. See also § 636(b)(1)(B). The statute and rule have also been interpreted as authorizing magistrate judges to issue orders under § 636(b)(1)(A) for non-dispositive motions or motions not involving injunctive relief. See also, United States v. Raddatz, 447 U.S. 667, 673, 100 S. Ct. 2406 (1980) (magistrate judge may decide any pretrial matter except "dispositive" motions).

⁴ In addition, the undersigned asked for briefing concerning possible mootness of any stay given that the BPT had initially effectuated the judgment.

1 As in nearly all rulings of magistrate judges pursuant to § 636(b)(1)(A), parties are
2 told to do something or not do something. For example, parties are compelled to answer
3 interrogatories, produce documents, attend a deposition at a certain time and place, pay sanctions,
4 precluded from using documents and so forth. No one would think of asserting that such non-
5 dispositive orders are invalid because they command or disallow the performance of a certain
6 activity. Therefore, the fact that parties are directed in their activities by a magistrate judge
7 cannot, without more, transform the matter at hand into an "injunctive" relief matter governed by
8 § 636(b)(1)(B). See, e.g., Grimes v. City and County of San Francisco, 951 F.2d 236 (9th Cir.
9 1991) (magistrate judge may compel a party to pay prospective sanctions of \$500.00 per day
10 during period of non-compliance with discovery orders to ensure compliance); Rockwell Intern.
11 Inc. v. Pos-A-Traction Industries, 712 F.2d 1324 (9th Cir. 1983) (magistrate judge may order
12 witnesses to answer questions); New York v. United States Metals Roofing Co., 771 F.2d 796
13 (3rd Cir. 1985) (magistrate judge may prevent a party from releasing discovery information to the
14 public; specifically held not to be an injunction beyond authority of magistrate judge); Affeldt v.
15 Carr, 628 F. Supp. 1097, 1101 (N.D. Oh. 1985) (issuance of gag orders and disqualification of
16 counsel are duties permitted to a magistrate judge). It is only when the "injunctive" relief sought
17 goes to the merits of plaintiff's actions or to complete stays of an action that orders under
18 §636(b)(1)(A) are precluded. See, e.g., Reynaga v. Cammisa, 971 F.2d 414 (9th Cir. 1992);
19 compare, State of New York, 771 F.2d at 801 (orders which restrain or direct the conduct of the
20 parties are not to be characterized as an appealable injunction beyond the authority of the
21 magistrate judge unless the restraint goes to the merits of the action). See also Tam v. INS, 14 F.
22 Supp. 2d 1184 (E.D. Cal. 1998) (the undersigned ordered petitioner released on conditions
23 pending a decision in a habeas corpus action).

24 Local Rule 72-302(a) provides that a magistrate judge should "perform all duties
25 permitted by 28 U.S.C. § 636(a), (b)(1)(A), or other law where the standard of review of the
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Magistrate Judge's decision is clearly erroneous or contrary to law." The rule specifically states that such authority is not limited to the specific duties delineated in the rule.

While § 636(b)(1)(B) precludes a magistrate judge from determining a motion for injunctive relief, it does not preclude a magistrate judge from ordering a prisoner released pursuant to Fed. R. App. P. 23(c), see infra. Rule 23(c) does not preclude a magistrate judge from acting by order.

A habeas corpus action is a quasi-criminal action. Magistrate judges decide matters relating to bail in criminal cases by order as a matter of course. No court has ever held that such is a "dispositive" order. Deciding whether petitioner gets bail pending appeal similarly does not dispose of this case. It merely determines whether to release petitioner pending a court of appeals ruling on the case itself. When there is no principled basis for the distinction between the magistrate judge authority in criminal cases and habeas corpus cases, the magistrate judge should act by order. In either case, the order of the magistrate judge is not dispositive to the merits. The law has not become so illogical such as to warrant the magistrate judge "ordering" release on bail or other conditions in a criminal action, but to deny the magistrate judge the same authority to release, or deny a request for release, on bail or conditions in a habeas corpus action. Therefore, the court will decide petitioner's motion for release by order.

In regard to the matter of dissolving the stay granted to respondent, because that stay of judgment was ordered by the district court, the undersigned may not override that order by another order, and will make findings and recommendations.

IV. PETITIONER'S MOTION FOR RELEASE

Fed. R. App. P. 23 provides in part:

(c) Release Pending Review of Decision Ordering Release.
While a decision ordering the release of a prisoner is under review, the prisoner must - unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise - be released on personal recognizance, with or without surety.

1 The filing of respondent's appeal does not divest this court of jurisdiction to
2 determine petitioner's motion for release. Stein v. Wood, 127 F.3d 1187, 1190 (9th Cir. 1997).

3 The plain language of Rule 23 gives the district court jurisdiction
4 concurrent with the appeals court over the custody of a habeas
5 petitioner. As the Supreme Court has made clear, a district court
6 has broad discretion in conditioning a judgment granting habeas
7 relief, including whether or not to release a prisoner pending
8 appeal.

9 Id., citing Hilton v. Braunskill, 481 U.S. 770, 775, 107 S. Ct. 2113, 2118-19 (1987). See also
10 Foster v. Lockhart, 9 F.3d 722, 727 (8th Cir.1993) (finding that "[f]ederal district courts have
11 power to order a successful state habeas petitioner's release with or without bail" and citing
12 Fed. R. App. P. 23(c)).

13 Therefore, the motion for release should be determined under appellate Rule 23.

14 "Rule 23(d) creates a presumption of correctness for the order of a district court
15 entered pursuant to Rule 23(c), whether that order enlarges the petitioner or refuses to enlarge
16 him, but this presumption may be overcome in the appellate court 'for special reasons shown.'"
17 Hilton, 481 U.S. at 774, 107 S. Ct. at 2118 (quoting Rule 23(d)). Although subsection (c) creates
18 a presumption of release from custody, it specifically states that a judge may otherwise order. A
19 district court has broad discretion in conditioning its judgments in habeas corpus actions. Hilton,
20 481 U.S. at 775, 107 S. Ct. at 2118. "Federal courts are authorized, under 28 U.S.C. § 2243, to
21 dispose of habeas corpus matters 'as law and justice require.'" Id.

22 Such discretion is especially important in the unique circumstances of this case.
23 This case does not present the ordinary situation where a conviction has been "overturned" by a
24 district court judgment, and if upheld by the appellate court, the petitioner is in the same position
25 he would be prior to his state trial. In such an ordinary situation, bail is appropriately the
26 presumption for such "pre-trial detainees." However, in this case, petitioner Yellen was not
entitled to be "retried or released," at best, he was only entitled to the actual setting of a parole
date. This setting does not guarantee his immediate release.

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1 The instant case did not involve a finding by this court that parole was to be set on
2 a date certain—it involved a finding that the BPT and state court's refusal to find parole
3 eligibility was unreasonable. Parole eligibility is only the first step in the parole of
4 indeterminate sentenced prisoners; a parole date must be calculated according to state law
5 regulatory matrices. If, however, petitioner's actual parole date would, with reasonable
6 certainty, coincide with the eligibility finding (which might happen in situations where parole
7 eligibility was unjustly delayed), release on bail pending appeal could well be appropriate. The
8 court cannot find that petitioner would be entitled to parole at the present time. The
9 aforementioned matrices do not involve calculations ordinarily within the ken of this federal
10 court, and petitioner's papers, although establishing a possibility of immediate parole, are
11 insufficient to convince this court that the judgment of this court regarding parole eligibility
12 would require such a finding.

13 Therefore, the court will not order the immediate release of petitioner on bail at
14 this time.

15 V. CONTINUED STAY OF JUDGMENT

16 In the circumstances of this case, the propriety of a continued stay is not the
17 mirror image of the release issue. While petitioner is not entitled to immediate release, whether
18 the BPT should remain entirely inactive with respect to setting a date is a different matter. And,
19 as the facts indicate, BPT has acted both to set a date in conformance with the judgment and has
20 retracted such action as well. In deciding the propriety of the continued stay, the court will
21 utilize the standards set forth by the Supreme Court.

22 The rules governing a stay of judgment on appeal are found in Fed. R. Civ. P. 62.
23 In Hilton, the Supreme Court restated the traditional factors:

24 “(1) whether the stay applicant has made a strong showing that he is likely to
25 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

26 \\\

whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Id. 481 U.S. at 776, 107 S. Ct. at 2119.

1. State's Likelihood of Success on Appeal / Substantial case on the Merits

In regard to this first factor, respondent argues that this court failed to apply the appropriate standard of review under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Respondent claims that this court did not explain how the state court's decisions were "clearly contrary to" or an "objectively unreasonable application of" controlling supreme court authority, but instead granted habeas relief on the grounds expressly rejected by the state courts. Respondent states that the Board's hearing decision need be based only on some evidence, which the hearing transcript shows. Resp. Memo of P & A, filed May 30, 2002, Exh. E. Specifically, respondent states that the circumstances of the crime and petitioner's description of his responsibility for the crime meet the some evidence standard.

Respondent takes objection with this court's findings and recommendations in which it was noted that the circumstances of petitioner's crime will never change. Respondent claims that consideration of the facts of the crime are not prohibited from consideration by the Board in deciding parole. Under California law, respondent argues that the commitment offense may be the sole reason to deny parole. Respondent also attempts to distinguish McQuillion v. Duncan, 306 F.3d 895 (9th Cir. 2002) and Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003).

The state has not shown that it would likely be successful on appeal or that it has a substantial case on the merits. Respondent's arguments are simply a rehash of arguments previously addressed in the findings and recommendations. AEDPA deference does not mean that state court decisions are never subject to being overturned in federal habeas. Respondent suggests that the Ninth Circuit's opinion in Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003), that continued reliance on an unchanging factor such as the circumstances of the offense can result in a due process violation, was dicta.

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1 Specifically, respondent takes issue with this court's rejection of BPT's mantra-
2 like invocation of the gravity of the offense criteria. The Ninth Circuit cautioned the BPT
3 regarding its continued reliance on the gravity of the offense and petitioner's conduct prior to the
4 offense:

5 As in the present instance, the parole board's sole supportable reliance on the
6 gravity of the offense and conduct prior to imprisonment to justify denial of parole
7 can be initially justified as fulfilling the requirements set forth by state law. Over
8 time, however, should Biggs continue to demonstrate exemplary behavior and
9 evidence of rehabilitation, denying him a parole date simply because of the nature
10 of his offense would raise serious questions involving his liberty interest.

11 Biggs, 334 F.3d at 916.

12 The Ninth Circuit continued that "[a] continued reliance in the future on an unchanging factor,
13 the circumstance of the offense and conduct prior to imprisonment, runs contrary to the
14 rehabilitative goals espoused by the prison system and could result in a due process violation."
15 Id. at 917.

16 The Ninth Circuit's opinion is simply an expression of common sense. The way
17 in which a murder is carried out speaks much, *initially*, to a person's propensity to continue with
18 acts of senseless violence. What is important for the BPT to figure out in a parole suitability
19 context is whether a prisoner may still possess that state of mind. The more senseless the initial
20 crime, the more likely that the prisoner has the potential for more senseless acts. However, when
21 a prisoner demonstrates by his conduct over time, in a place that is undeniably difficult in terms
22 of restraining oneself from further violent acts, that he can indeed refrain from senseless acts of
23 violence, the significance of the *potential* for violence as an inference from the facts of the crime
24 substantially evaporates. Long term conduct reaching into the present time speaks much louder
25 for predictive purposes than an inference drawn from long ago, unchanging facts.

26 Refusing to acknowledge common sense in this case, respondent attempts to
justify the BPT's continued reliance on the facts of the crime in one BPT parole eligibility
hearing after another. This court had determined that enough was enough, and refused to further

1 sanction such a rejection of common sense. Yellen has been a model prisoner, has undergone
 2 several parole eligibility hearings, and has been incarcerated for over twenty years (at present),
 3 and approximately seventeen at the time of his eligibility hearing in question. In essence, this
 4 court determined that in light of the well established facts, the serious character of the crime
 5 would never change, and to continue to invoke it as a reason to deny eligibility would transform
 6 Yellen's sentence into one in which parole could never be granted, except when some board in
 7 the future decided, arbitrarily and at odds with the facts, that maybe the crime wasn't so serious
 8 after all. In addition, this court determined that the BPT's "needs more therapy" justification was
 9 so contradicted by the facts (even recited facts at the hearing) that parole eligibility could not
 10 reasonably be upheld on that ground.⁵

11 In sum, there was no reasonable justification advanced previously for BPT's
 12 denial of parole eligibility, and respondent's mere filing of a notice of appeal has not changed
 13

14 ⁵The findings and recommendations set forth this information and is repeated here:

15 Petitioner had no juvenile record and lacked any criminal history
 16 other than some vehicle code violations. Id., p. 13. Petitioner had
 17 a classification score of zero. Id., p. 18. Petitioner was virtually
 18 disciplinary free. Id., p. 18. Petitioner also had obtained
 19 substantial vocational training since being imprisoned and
 20 completed his GED as well as participated in college programs.
 21 Id., pp. 19-20. Petitioner participated in the Straight Life Program
 22 and the Parole Recidivism Program, volunteered as a tutor in the
 23 Literacy Program, and completed the Anger Management Program.
 24 Id., p. 20. Petitioner had psychological reports stating that his
 25 violence potential upon release was average or lower than average.
 26 Id., p. 23. At the hearing, petitioner expressed remorse for his
 crimes. Id. at 36. A psychological report stated,

There is no evidence of psychopathology or mental or
 emotional problems of any kind that would preclude routine
 release planning in this case. There is no evidence of emotional
 problems that would require further diagnosis or participation in
 psychotherapy. The prognosis of successful adjustment in this case
 is very good.

Id., pp. 24-25.

Findings and Recommendations, filed August 20, 2003, at 11.

1 this fact. While in many cases a district court's judgment may be subject to reasonable
2 arguments in support of overturning the judgment, this case does not appear to be in that genre.

3 2. Irreparable Injury to the State

4 Respondent advances no meritorious argument that indicates that the mere setting
5 of a parole date while this case is pending on appeal would cause any harm, much less irreparable
6 harm. Respondent does not assert that petitioner would have his actual parole date calculated
7 such that he would be entitled to release during the pendency of appeal.

8 3. Substantial Injury to Petitioner

9 Petitioner could be potentially, seriously impacted by a delay in setting his parole
10 date. If the judgment were ultimately affirmed, the BPT could "start from scratch" and calculate
11 petitioner's parole date, not from 1999, or even the time that the district court judgment was
12 entered, but at the time the appellate mandate issued and/or after a petition for certiorari was
13 denied. In addition, if BPT should change its current position with respect to calculating
14 petitioner's actual parole date, it might find that a reasonable calculation would indicate that
15 petitioner should be immediately placed on parole, in which case, petitioner could renew his
16 motion to be released pending appeal.

17 4. The Public Interest

18 There appears to be no public interest in continuing a stay of the judgment in this
19 case. The facts of this case are unique to this case, and to not warrant a finding that the public
20 interest, in general, would be impacted by having the BPT calculate and establish a parole date.
21 Neither BPT nor the courts will be flooded with applications for parole eligibility findings based
22 on the facts of this case.

23 VI. CONCLUSION


24 Accordingly, IT IS HEREBY ORDERED that:

25 1. Petitioner's motions for immediate release, filed November 3, 2003, and
26 January 5, 2004, are denied.

1 For the reasons stated within this opinion, IT IS HEREBY RECOMMENDED
2 that the judgment in this case not be stayed, and the stay entered February 4, 2004 be dissolved.

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
8 shall be served and filed within five days after service of the objections. The parties are advised
9 that failure to file objections within the specified time may waive the right to appeal the District
10 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: February 23, 2004.

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GREGORY G. HOLLOWES.
UNITED STATES MAGISTRATE JUDGE

GGH:076
ycll2398.rcl

FILED

OCT - 1 2003

CLERK, U.S. DISTRICT COURT
STERN DISTRICT OF CALIFORNIA

CC. JET CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MIKE YELLEN,

Petitioner,

No. CIV S-01-2398 MCE GGH P

vs.

DIANE BUTLER, et al.,

Respondents.

ORDER

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On August 20, 2003, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Respondent Diane Butler has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

33

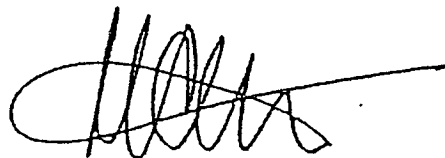
1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The findings and recommendations filed August 20, 2003, are adopted in full;

3 and

4 2. Petitioner's application for a writ of habeas corpus is granted as to petitioner's
5 due process claim that there was not sufficient evidence to support the 1999 decision finding him
6 unsuitable for parole; within thirty days of the date of this order, petitioner shall be given a parole
7 date, assuming his record remains substantially unchanged from the time of the 1999 hearing; the
8 petition is denied in all other respects.

9 DATED: SEP 30 2003

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11 

12 MORRISON C. ENGLAND JR.
13 UNITED STATES DISTRICT JUDGE

14 /yc112398.806

EXHIBIT 48

Coleman v. BPT

FILED

DEC 2 2 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

United States District Court
Eastern District of California

Melvyn H. Coleman,

No. Civ. S-96-0783 LKK PAN P

Petitioner,

Findings and Recommendations

vs.

Board of Prison Terms, et al.,

Respondents.

-oOo-

Petitioner seeks a writ of habeas corpus.

In his November 14, 1997, second amended petition petitioner claims his federal due process guarantee was violated because the California Board of Prison Terms (Board) has failed to conduct a fair parole suitability hearing.

In 1974 petitioner was convicted of first degree murder, attempted murder, first degree robbery, first degree burglary and other charges. The victims, Mr. And Mrs. Siewart, returned to their home while petitioner was burglarizing it; he then

1 approached before they got out of their car and robbed and shot
 2 them, killing Mr. Siewart and seriously wounding Mrs. Siewart.
 3 Petitioner had a prior juvenile record.

4 Under California law, a prisoner including a convicted
 5 murderer serving an indeterminate term (i.e., seven years to
 6 life) is entitled to a hearing before a panel composed of members
 7 of the Board to determine his suitability for parole. By
 8 statute, parole at some point normally is appropriate and the
 9 Board "shall set a release date unless it determines that the
 10 gravity of the current convicted offense or offenses, or the
 11 timing and gravity of current or past convicted offense or
 12 offenses, is such that consideration of the public safety
 13 requires a more lengthy period of incarceration. . . ." Cal.
 14 Penal Code § 3041(b). Procedures governing suitability hearings
 15 are set forth in Penal Code § 3041.5 (providing prisoners with
 16 notice and an opportunity to be heard and requiring a written
 17 statement of reasons if the panel refuses to set a parole date).
 18 Regulations prescribe factors for the panel to consider in
 19 determining whether each prisoner is suitable or unsuitable for
 20 parole. 15 CAC § 2281.¹

21
 22 ¹ Factors supporting a finding of unsuitability include: (1) whether the
 23 prisoner's offense for which he is confined was committed in an "especially
 24 heinous, atrocious or cruel manner"; (2) the prisoner's record of violence prior
 25 to the offense; (3) whether the prisoner has an unstable social history; (4)
 26 whether the prisoner has committed sadistic sexual offenses; (5) whether the
 prisoner has a lengthy history of severe mental problems related to the offense;
 and (6) whether the prisoner has engaged in serious misconduct in prison or jail.
 Factors supporting a finding of suitability include: (1) whether the prisoner has
 a juvenile record; (2) whether the prisoner has experienced reasonably stable
 relationships with others; (3) whether the prisoner shows signs of remorse; (4)

1 Petitioner presents evidence that under Governors Wilson and
2 Davis the Board disregarded regulations ensuring fair suitability
3 hearings and instead operated under a sub rosa policy that all
4 murderers be found unsuitable for parole. The record shows that
5 between 1992 and 1998 less than one percent of the prisoners in
6 this group were released on parole. During the previous period
7 the parole rate had been about four percent. Petitioner presents
8 sworn testimony that the policy was enforced by (1) appointing
9 Board members less likely to grant parole and more willing to
10 disregard their statutory duty; (2) removing Board members more
11 likely to grant parole; (3) reviewing decisions finding a
12 prisoner suitable and setting a new hearing before a different
13 panel; (4) scheduling rescission hearings for prisoners who had
14 been granted a parole date; (5) re-hearing favorable rescission
15 proceedings and hand-picking panels to ensure the desired
16 outcome; (6) panel members agreeing upon an outcome in advance of
17 the hearing; and (7) gubernatorial reversal of favorable parole
18 decisions. See e.g., declaration of former BPT Commissioner
19 Albert Leddy (Leddy) paras. 5, 6, 8-17, 20 (attached as Ex. 17 to
20 petitioner's March 27, 2003, motion for discovery); deposition of
21 Leddy taken in In re Fortin, et al., San Diego Superior Court

22 _____

23 whether the prisoner committed his crime as the result of significant stress in
24 his life; (5) whether the prisoner suffered from Battered Woman Syndrome when she
25 committed the crime; (6) whether the prisoner lacks any significant history of
26 violent crime; (7) whether the prisoner's present age reduces the probability of
 recidivism; (8) whether the prisoner has made realistic plans for release or has
 developed marketable skills that can be put to use on release; and (9) whether
 the prisoner's institutional activities indicate an enhanced ability to function
 within the law upon release. 15 CAC § 2281.

1 case number HSC10279 at 18-19, 47-50, 56-59, 61-63, 65-66, 88-89,
 2 95, 97-99, 102, 106, 110, 118 & 126 (attached as Ex. 10 to
 3 petitioner's March 27, 2003, motion for discovery); deposition of
 4 former BPT Commissioner Edmund Tong taken in Kimble v. Cal. BPT,
 5 C.D. Cal. case number CV 97-2752 at 42-43, 45-47, 71, 73, 80-82,
 6 85-86, 96, 103, 105, 107 & 109 (lodged December 30, 2003).²

7 The unrefuted record shows the no-parole-for-murderers
 8 policy existed and continued under Governor Davis. In In re
 9 Rosencrantz, the California Supreme Court took note of evidence
 10 presented in the state trial court establishing that the Board
 11 held 4800 parole suitability hearings between January 1999
 12 through April 2001, granting parole to 48 murderers (one
 13 percent). 29 Cal. 4th 616, 685 (2003). Of those 48, the
 14 governor reversed 47 of the Board's decisions and only one
 15 murderer out of 4800 actually was released on parole. Id.
 16 Petitioner in Rosenkrantz also submitted evidence of the
 17 following interview of Governor Davis reflected in the April 9,
 18 1999, edition of the Los Angeles Times: "... [T]he governor
 19 was adamant that he believes murderers - even those with second-
 20 degree convictions - should serve at least a life sentence in
 21 prison. [Para.] Asked whether extenuating circumstances should

22
 23 ² Meanwhile, the annual cost to taxpayers of conducting these "pro forma"
 24 hearings is enormous, amounting to millions of dollars per year. See Exhibit 7
 25 to petitioner's March 27, 2003, motion for discovery (California Legislative
 26 Analyst's Office - Analysis of the 2000-01 Budget Bill for the Board of Prison
 Terms criticizing proposed \$19 million annual budget and noting huge cost of
 additional incarceration resulting from no-parole policy).

1 be a factor in murder sentences, the governor was blunt: "No.
2 Zero . . . They must not have been listening when I was
3 campaigning. . . . If you take someone else's life, forget it.
4 I just think people dismiss what I said in the campaign as either
5 political hyperbole or something that I would back away from . .
6 . . We are doing exactly what we said we were going to do.""
7 29 Cal. 4th at 684.

8 Respondent does not refute the alleged facts. Instead,
9 respondent argues that, assuming arguendo prisoners in California
10 have an interest in a parole date protected by the due process
11 clause, constitutional requirements are met so long as there is
12 "some evidence" supporting the findings petitioner is unsuitable.
13 See Oppo. at 7:20 (so long as "some evidence" standard is met,
14 "the Board decisions could not have been arbitrary.") For the
15 reasons explained, this court rejects that claim. As this court
16 previously has found, there always will be "some evidence" that
17 can be used to explain a denial or rescission under the
18 circumstances. Federal due process requires more.

19 California's parole scheme gives rise to a protected liberty
20 interest in release on parole. McQuillion v. Duncan, 306 F.3d
21 895, 902 (2002); Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389,
22 1390 (9th Cir. 1987); Greenholtz v. Inmates of Nebraska Penal &
23 Correctional Complex, 442 U.S. 1 (1979); Biags v. Terhune, 334
24
25
26

1 F.3d 910, 915 (9th Cir. 2003); In re Rosenkrantz, 29 Cal. 4th 616
 2 (2003).³

3 Therefore, petitioner is entitled to the process outlined in
 4 Greenholtz, viz., notice, opportunity to be heard, a statement of
 5 reasons for decision, and limited right to call and cross-examine
 6 witnesses. The determination that petitioner is unsuitable for
 7 parole must be supported by some evidence bearing some indicia of
 8 reliability.

9 These guarantees do not exhaust petitioner's right to due
 10 process. The fundamental core of due process is protection
 11 against arbitrary action:

12 The principal and true meaning of the phrase has never
 13 been more tersely or accurately stated than by Mr.
 14 Justice Johnson, in Bank of Columbia v. Okely, 17 U.S.
 15 235, 4 Wheat. 235-244, 4 L.Ed. 449 [(1819)]: "As to the
 16 words from Magna Charta, incorporated into the
 17 Constitution of Maryland, after volumes spoken and
 18 written with a view to their exposition, the good sense
 19 of mankind has at last settled down to this: that they
 20 were intended to secure the individual from the
 21 arbitrary exercise of the powers of government,
 22 unrestrained by the established principles of private
 23 right and distributive justice."

19 Hurtado v. California, 110 U.S. 516, 527, (1884). "The
 20 concessions of Magna Charta were wrung from the king as
 21 guaranties against the oppressions and usurpations of his
 22

23 ³ That is so because the parole statute, Penal Code § 3041, uses mandatory
 24 language ("The panel or board shall set a release date unless it determines"
 25 further incarceration is necessary in the interest of public safety) which
 26 "creates a presumption that parole release will be granted," unless the
 27 statutorily defined determinations are made. Board of Pardons v. Allen, 482 U.S.
 369, 378 (1987) (quoting Greenholtz, 442 U.S. at 12). As of 1988, by amendment
 of the state constitution, a parole date given can be withdrawn by the Governor
 under the same factors considered by the Board.

1 prerogative." Id. at 531. "The touchstone of due process is
2 protection of the individual against arbitrary action of
3 government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974),
4 citing Dent v. West Virginia, 129 U.S. 114 (1889).

5 A government official's arbitrary and capricious exercise of
6 his authority violates the essence of due process, contrary to
7 centuries of Anglo-American jurisprudence. See Yick Wo v.
8 Hopkins, 118 U.S. 356, 369 (1886) ("When we consider the nature
9 and the theory of our institutions of government, the principles
10 upon which they are supposed to rest, and review the history of
11 their development, we are constrained to conclude that they do
12 not mean to leave room for the play and action of purely personal
13 and arbitrary power."); United States v. Lee, 106 U.S. 196, 220
14 (1882) ("No man in this country is so high that he is above the
15 law. No officer of the law may set that law at defiance with
16 impunity. All the officers of the government from the highest to
17 the lowest, are creatures of the law and are bound to obey it.
18 It is the only supreme power in our system of government, and
19 every man who by accepting office participates in its functions
20 is only the more strongly bound to submit to that supremacy, and
21 to observe the limitations which it imposes upon the exercise of
22 the authority which it gives."); U.S. v. Nixon, 418 U.S. 683,
23 695-96 (1974) (rule of law is "historic commitment"); Accardi v.
24 O'Shaughnessy, 347 U.S. 260, 267-68 (1954) (Attorney General must
25 abide by regulations and cannot dictate immigration board's
26 exercise of discretion in decision on application to suspend

1 deportation; remedy is new hearing where board will exercise it's
2 discretion free from bias).

3 Concomitant to the guarantee against arbitrary and
4 capricious state action is the right to a fact-finder who has not
5 predetermined the outcome of a hearing. See Withrow v. Larkin,
6 421 U.S. 35 (1975) (a fair trial in a fair tribunal is a basic
7 requirement of due process, and this rule applies to
8 administrative agencies which adjudicate as well as to courts);
9 Edwards v. Balisok, 520 U.S. 641 (1997) (recognizing due process
10 claim based on allegations that prison disciplinary hearing
11 officer was biased and would suppress evidence of innocence);
12 Bakalis v. Golembeski, 35 F.3d 318, 326 (7th Cir. 1994) (a
13 decision-making body "that has prejudged the outcome cannot
14 render a decision that comports with due process").

15 Courts too numerous to list have recognized that the right
16 to a disinterested decision-maker, who has not prejudged the
17 case, is part of the fundamental guarantee against arbitrary and
18 capricious government conduct in the California parole context.
19 See, e.g., Rosenkrantz, 29 Cal. 4th at 677 (parole decision "must
20 reflect an individualized consideration of the specified criteria
21 and cannot be arbitrary and capricious"); In re Ramirez, 94 Cal.
22 App. 4th 549, 563 (2001) ("some evidence" standard is "only one
23 aspect of judicial review for compliance with minimum standards
24 of due process" (citing Balisok) and Board violates due process
25 if its decision is "arbitrary and capricious"); In re Minnis, 7
26 Cal. 3d 639 (1972) (blanket no-parole policy as to certain

1 category of prisoners is illegal); In re Morrall, 102 Cal. App.
2 4th 280 (2003) (same). The guarantee of neutral parole officials
3 in a suitability hearing is just as fundamental as the right to a
4 neutral judge in a court proceeding. Compare Sellars v.
5 Procunier, 641 F.2d 1295 (9th Cir. 1981) (holding that California
6 parole officials, analogous to judges, are entitled to absolute
7 immunity);.

8 The Ninth Circuit previously has acknowledged California
9 inmates' due process right to parole consideration by neutral
10 decision-makers. See O'Bremski v. Maas, 915 F.2d 418, 422 (9th
11 Cir. 1990). In that case the appellate court found that a
12 neutral parole panel at a new hearing would reach the same
13 outcome and so denied relief. The record in this case simply
14 will not permit the same conclusion. The requirement of an
15 impartial decision-maker transcends concern for diminishing the
16 likelihood of error. As the Supreme Court clearly held in
17 Balisok a decision made by a fact-finder who has predetermined
18 the outcome is per se invalid -- even where there is ample
19 evidence to support it. 520 U.S. at 648.

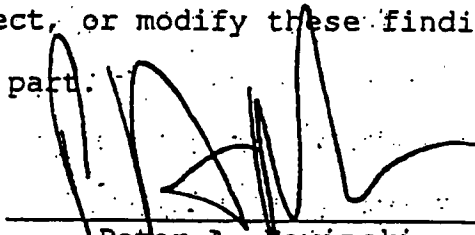
20 Petitioner presents a convincing case that a blanket policy
21 against parole for murderers prevented him from obtaining a
22 parole suitability determination made after a fair hearing.
23 Respondent offers nothing to counter petitioner's showing.

24 Accordingly, the court hereby recommends that the petition
25 for habeas corpus be granted unless, within 60 days of the
26 district court's adoption of these recommendations, respondent

1 provides a fair parole suitability hearing, conducted by a board
2 free of any prejudice stemming from a gubernatorial policy
3 against parole for murderers.

4 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
5 findings and recommendations are submitted to the United States
6 District Judge assigned to this case. Within 20 days after being
7 served with these findings and recommendations, respondent may
8 file written objections. The document should be captioned
9 "Objections to Magistrate Judge's Findings and Recommendations."
10 The district judge may accept, reject, or modify these findings
11 and recommendations in whole or in part.

12 Dated: DEC 21 2004


13 _____
14 Peter A. Nowinski
15 Magistrate Judge
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26 cole0783.f&r grant

EXHIBIT 49

Irons v. Warden of Cal. State Prison-Solano

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 CARL MERTON IRONS, II,

NO. CIV. S-04-220 LKK/GGH P

12 Petitioner,

13 v.

O R D E R

14 ARNOLD SCHWARZENEGGER,
15 Governor, et al.,

16 Respondents.
17 _____/

18 The court is in receipt of respondents' motion for a stay of
19 judgment in the above-captioned case. Having reviewed respondents'
20 motion and petitioner's opposition, the court hereby ORDERS that
21 the judgment is STAYED for thirty (30) days to allow respondents
22 to seek a stay from the Court of Appeals.

23 IT IS SO ORDERED.

24 DATED: February 11, 2005.

25 /s/Lawrence K. Karlton
26 LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

CARL MERTON IRONS II,

CASE NO: 2:04-CV-00220-LKK-GGH

v.

TOM L CAREY,

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER OF 01/19/05**

Jack L. Wagner
Clerk of the Court

ENTERED: January 19, 2005

by: /s/ - N. Cannarozzi
Deputy Clerk

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 CARL MERTON IRONS, II,

11 Petitioner,

No. CIV S-04-0220 LKK GGH P

12 vs.

13 WARDEN OF CALIFORNIA
14 STATE PRISON-SOLANO, et al.,

15 Respondents.

ORDER

16 Petitioner, a state prisoner proceeding with counsel, has filed this application for a
17 writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States
18 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

19 On September 1, 2004, the magistrate judge filed findings and recommendations
20 herein which were served on all parties and which contained notice to all parties that any
21 objections to the findings and recommendations were to be filed within twenty days. Both
22 parties have filed objection to the findings and recommendations. Petitioner has filed a reply to
23 respondent's objections.

24 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-
25 304, this court has conducted a de novo review of this case. Having carefully reviewed the
26 entire file, the court finds the findings and recommendations to be supported by the record and by

1 proper analysis.

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. The findings and recommendations filed September 1, 2004, are adopted in
4 full.

5 2. The petition is granted as to the claim that there was not sufficient evidence to
6 support the 2001 decision finding petitioner unsuitable for parole; the petition is denied in all
7 other respects.

8 3. Within thirty days of the date of this order, assuming the commission of no
9 serious disciplinary infractions henceforth, especially infractions of a violent nature, BPT is
10 ordered to calculate petitioner's release date, and petitioner is to be released on parole.

11 DATED: January 18, 2005.

12 /s/Lawrence K. Karlton
13 LAWRENCE K. KARLTON
14 SENIOR JUDGE
UNITED STATES DISTRICT COURT

15 /iron0220.805

FILED

SEP - 2 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARL MERTON IRONS, II,

Petitioner,

No. CIV S-04-0220 LKK GGH P

vs.

WARDEN OF CALIFORNIA
STATE PRISON-SOLANO¹, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1985, petitioner was convicted of second degree murder and sentenced to seventeen years to life with a two year enhancement for use of a firearm. Petitioner challenges the 2001 decision of the Board of Prison Terms (BPT) finding him unsuitable for parole. This was petitioner's fifth parole suitability hearing.

¹ Previously named as respondent was Governor Arnold Schwarzenegger. The court now substitutes in the correct respondent, the Warden of the California State Prison-Solano, where petitioner is presently incarcerated. "A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition." Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994) (citing Rule 2(a), 28 U.S.C. foll. § 2254).

1 The petition raises the following claims: 1) Cal. Penal Code § 3041 required the
 2 BPT to set a parole date for petitioner; 2) petitioner's prison term was not proportionate to
 3 persons committed for similar crimes in violation of the Equal Protection Clause; 3) petitioner
 4 was found unsuitable pursuant to a no-parole policy; 4) the Superior Court abused its discretion;
 5 and 5) there was not sufficient evidence to find petitioner unsuitable. *

6 On May 3, 2004, respondents filed an answer to the petition, attached to which are
 7 various exhibits. On May 12, 2004, respondents filed an amended answer. The amended answer
 8 refers to the exhibits attached to the original answer.

9 After carefully considering the record, the court recommends that the petition be
 10 granted on grounds that there was not sufficient evidence to support the 2001 decision. The court
 11 recommends that the petition be denied in all other respects.

12 II. Anti-Terrorism and Effective Death Penalty Act (AEDPA)

13 The AEDPA applies to this petition for habeas corpus which was filed after the
 14 AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir.), citing Lindh v. Murphy,
 15 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus,"
 16 establishing more deferential standards of review to be used by a federal habeas court in
 17 assessing a state court's adjudication of a criminal defendant's claims of constitutional error.
 18 Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

19 In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme
 20 Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion
 21 for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy
 22 between "contrary to" clearly established law as enunciated by the Supreme Court, and an
 23 "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies
 24 to two situations: (1) where the state court legal conclusion is opposite that of the Supreme
 25 Court on a point of law, or (2) if the state court case is materially indistinguishable from a
 26 Supreme Court case, i.e., on point factually, yet the legal result is opposite.

1 "Unreasonable application" of established law, on the other hand, applies to
2 mixed questions of law and fact, that is, the application of law to fact where there are no factually
3 on point Supreme Court cases which mandate the result for the precise factual scenario at issue.
4 Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the
5 AEDPA standard of review which directs deference to be paid to state court decisions. While the
6 deference is not blindly automatic, "the most important point is that an *unreasonable* application
7 of federal law is different from an incorrect application of law [A] federal habeas court may
8 not issue the writ simply because that court concludes in its independent judgment that the
9 relevant state-court decision applied clearly established federal law erroneously or incorrectly.
10 Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at 410-11, 120
11 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of
12 demonstrating the objectively unreasonable nature of the state court decision in light of
13 controlling Supreme Court authority. Woodford v. Viscotti, ___ U.S. ___, 123 S. Ct. 357
14 (2002).

15 The state courts need not have cited to federal authority, or even have indicated
16 awareness of federal authority in arriving at their decision. Early v. Packer, ___ U.S. ___, 123
17 S. Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is
18 contrary to, or an unreasonable application of, established Supreme Court authority. Id. An
19 unreasonable error is one in excess of even a reviewing court's perception that "clear error" has
20 occurred. Lockyer v. Andrade, ___ U.S. ___, 123 S. Ct. 1166, 1175 (2003). Moreover, the
21 established Supreme Court authority reviewed must be a pronouncement on constitutional
22 principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules
23 binding only on federal courts. Early v. Packer, 123 S. Ct. at 366.

24 However, where the state courts have not addressed the constitutional issue in
25 dispute in any reasoned opinion, the federal court will independently review the record in
26 adjudication of that issue. "Independent review of the record is not de novo review of the

1 constitutional issue, but rather, the only method by which we can determine whether a silent state
 2 court decision is objectively unreasonable." Himes v. Thompson, ____ F.3d ____, 2003 WL
 3 21544120 (9th Cir. 2003).

4 In this case, petitioner received a silent denial from the California Supreme Court.
 5 Exhibit 2L of the answer reveals a short order by the Marin County Superior Court y concluding
 6 that the BPT's 2001 decision was supported by substantial evidence. Answer, Exhibit 2L.

7 III. Background

8 The background of petitioner's offense is contained in the life prisoner evaluation
 9 report prepared for petitioner's 2001 suitability hearing:

10 The defendant and victim both rented separate rooms from a
 11 couple who owned a house in the San Francisco area. The couple
 12 also, lived at the residence. The couple suspected the victim of
 13 stealing various items from them and conveyed this to Irons. On
 14 the night of March 9, 1984, Irons confronted the victim at the
 15 residence concerning the thefts and an argument ensued. The
 16 victim denied responsibility for the thefts and went to his room.
 17 Irons went to his room, obtained a .22 caliber rifle, inserted an
 18 ammunition clip and went downstairs to the victim's room. Irons
 19 called the victim's name and immediately fired 12 rounds of .22-
 20 caliber ammunition into him. Irons entered the room and told the
 21 victim he was going to let him bleed to death. When the victim
 22 complained of the pain, Irons took out his buck knife and stabbed
 23 him twice in the back. The victim was then rolled up into a
 24 sleeping bag and locked into the room. Over the next 10 days,
 25 Irons attempted to borrow a car. On March 19, 1984, Irons was
 26 able to borrow a friend's car. Irons wrapped a plastic drop cloth
 over the sleeping bag containing the body and then wrapped it in
 wire mesh weighted with pieces of pipe. After placing the body in
 the car, Irons drove to an isolated coastal location, carried the body
 into the surf as far as he could and released it.

On March 20, 1984, the body of the victim was found on the San
 Mateo County Coast. On March 30, 1984, the owner of the
 residence, where Irons and the victim were residents, was going to
 be arrested as a result of an investigation by the San Mateo County
 Sheriff's Department. At that point, Irons came forward and
 informed the detectives that he was the person they were looking
 for. Irons was subsequently arrested, advised of his rights and
 made a statement.

Answer, Exhibit D.

1 IV. Discussion

2 A. Sufficient Evidence

3 Petitioner argues that there was not sufficient evidence to find him unsuitable for
4 parole. California's parole scheme gives rise to a cognizable liberty interest in release on parole.
5 Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003). "In the parole context, the requirements of
6 due process are met if 'some evidence' supports the decision." Id. The evidence underlying the
7 board's decision must have some indicia of reliability. Id.

8 In Biggs, the Ninth Circuit indicated that a continued reliance on an unchanging
9 factor such as the circumstances of the offense could result in a due process violation. Biggs was
10 serving a sentence of twenty-five years to life following a 1985 first degree murder conviction.
11 In the case before the Ninth Circuit, Biggs challenged the 1999 decision by the BPT finding him
12 unsuitable for parole despite his record as a model prisoner. 334 F.3d at 913. While the Ninth
13 Circuit rejected several of the reasons given by the BPT for finding Biggs unsuitable, it upheld
14 three: 1) petitioner's commitment offense involved the murder of a witness; 2) the murder was
15 carried out in a manner exhibiting a callous disregard for the life and suffering of another; 3)
16 petitioner could benefit from therapy. 334 F.3d at 913.

17 The Ninth Circuit cautioned the BPT regarding its continued reliance on the
18 gravity of the offense and petitioner's conduct prior to the offense:

19 As in the present instance, the parole board's sole supportable
20 reliance on the gravity of the offense and conduct prior to
21 imprisonment to justify denial of parole can be initially justified as
22 fulfilling the requirements set forth by state law. Over time,
23 however, should Biggs continue to demonstrate exemplary
behavior and evidence of rehabilitation, denying him a parole date
24 simply because of the nature of his offense would raise serious
25 questions involving his liberty interest.

24 334 F.3d at 916.

25 The Ninth Circuit stated that "[a] continued reliance in the future on an
26 unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs

1 contrary to the rehabilitative goals espoused by the prison system and could result in a due
2 process violation." 334 F.3d at 917.

3 The court now considers whether there was some evidence to support the finding
4 of the 2001 panel that petitioner was not eligible for parole. The relevant regulations provide as
5 follows.

6 Cal. Code Regs. tit. 15 § 2402 sets forth the criteria for determining whether an
7 inmate is suitable for release on parole. Circumstances tending to show unsuitability include, in
8 relevant part,

9 (1) Commitment Offense. The prisoner committed the offense in
10 an especially heinous, atrocious or cruel manner. The factors to be
11 considered include:

12 *****

13 (B) The offense was carried out in a dispassionate and calculated
14 manner, such as an execution-style manner.

15 *****

16 (D) The offense was carried out in a manner which demonstrates
17 an exceptionally callous disregard for human suffering.

18 (E) The motive for the crime is inexplicable or very trivial in
19 relation to the offense.

20 *****

21 (3) Unstable Social History. The prisoner has a history of unstable
22 or tumultuous relationships with others.

23 Cal. Code Regs. tit. 15 § 2402 (c).

24 Circumstances tending to indicate suitability for parole include:

25 (1) No Juvenile Record. The prisoner does not have a record of
26 assaulting others as a juvenile or committing crimes with a
potential of personal harm to the victims.

(2) Stable Social History. The prisoner has experienced reasonably
stable relationships with others.

(3) Signs of Remorse. The prisoner performed acts which tend to
indicate the presence of remorse, such as attempting to repair the

1 damage, seeking help for or relieving suffering of the victim, or
 2 indicating that he understands the nature and magnitude of the
 offense.

3 (4) Motivation for the Crime. The prisoner committed his crime as
 4 the result of significant stress in his life, especially if the stress has
 built over a long period of time.

5 (5) Battered Woman Syndrome . . .

6 (6) Lack of Criminal History. The prisoner lacks any significant
 history of violent crime.

7 (7) Age. The prisoner's present age reduces the probability of
 8 recidivism.

9 (8) Understanding and Plans for Future. The prisoner has made
 10 realistic plans for release or has developed marketable skills that
 can be put to use upon release.

11 (9) Institutional Behavior. Institutional activities indicate an
 12 enhanced ability to function within the law upon release.

13 Cal. Code Regs. tit. 15 § 2402(d).

14 In finding petitioner unsuitable for parole, the panel found as follows:

15 Mr. Irons, this Panel has reviewed all information received from
 16 the public and relied on the following circumstances in concluding
 17 that you are not suitable for parole. And that you would pose an
 18 unreasonable risk of danger to society if released from prison at
 19 this time. In a unanimous decision, the Panel has--has given you a
 20 one year denial. Many factors were considered in coming to the
 21 decision. First and foremost was the commitment offense itself.
 22 This offense was carried out in an especially cruel and callous
 23 manner. The offense was carried out in a--in a calculated manner
 24 and also in a manner which demonstrates a callous disregard for
 25 human life. And the motive for this crime was trivial in relation to
 26 the offense. These conclusions are drawn from the Statement of
 Facts, wherein--wherein the prisoner reacted in a--in a violent
 manner when informed by his landlord that a co-tenant and
 acquaintance of the prisoner was stealing from the landlord. This
 report angered the inmate and caused him to confront the victim in
 the victim's room. Words were exchanged, causing the inmate
 to--causing the inmate more anger. The inmate left the room,
 retrieved a rifle, returned to the victim's room and shot the victim
 12 times. In addition, he also stabbed the--the victim twice with his
 buck knife. The inmate then wrapped the body in a sleeping bag,
 left the body in the victim's room and--for about 10 days before
 disposing of the dead body in the ocean. When he disposed the

body, he prepared the body for disposal by wrapping the body with a plastic drop cloth and wire mesh weighted down with pieces of pipe. During this hearing, the inmate said he planned to get away with the murder and probably would have, if not for the imminent arrest of a--an innocent party, which caused the inmate to--to confess to the authorities regarding his responsibility for this--for this crime. The inmate's actions resulted in the demise of a human being. The--the inmate has no--has minimal prior criminality and I note there are no convictions. He did have an unstable social history and I'm referring to his drug use at the time of the--of the commitment offense. He's done well while incarcerated. His psychiatric reports are good. His parole plans are good. There is no opposition from the District Attorney towards parole in this matter. And this Panel makes the following findings: That the prisoner needs therapy and continued participation in self-help programming in order to face, discuss, understand and cope with stress in a nondestructive manner. The prisoner's gains are appreciated by this Panel and he must continue the path that he's on. And he should be commended for a large number of things. He has participated in a number--to his credit, in a number of self-help programming, and I'll name just a few. The--The Alternatives to Violence, I think there are three different phases of it, the KAIROS Program, and also, he was --he was an active participant in the Gavel Club, a Toastmaster organization, and took part in Breaking Barriers, took part in the walkathon. He obtained his GED, I believe, while incarcerated. And he hasn't had any 115s--he's had one 115 during his incarceration and that was back in--on November 2nd, 1985, and has had no 128s. However, the positive aspects of his behavior do not outweigh the factors of his unsuitability. This Panel recommends that the prisoner remain disciplinary free and that, if available, continue his participation in self-help and therapy programming. And one of the--well, there's a number of things we consider, as I said earlier, Mr.--Mr. Irons, one of the things that caused me concern was some of your responses to the questions, even when your counsel asked you. I think you were asked by your counsel whether a--a situation like this would happen again, whether you would kill somebody. And I think you said, I don't think so. I'm not--that's not a very convincing reply to me, personally, and I--I think you're a sincere person and I certainly appreciate your--your forthrightness and your candor in this--in this hearing but as I indicated, I don't think you're quite ready for parole. I think it--it would be some time in the near future. I think you've heard me say that before, and hopefully the outcome of this hearing won't cause you any bitterness. I know you're disappointed. And you will continue to do what you're doing.

Respondent's Answer, Exhibit B.

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1 In finding petitioner unsuitable for parole the panel relied on the circumstances of
 2 the commitment offense. In particular the BPT stated that the offense was carried out in a
 3 calculated manner, demonstrated a callous disregard for human life, and that petitioner's motive
 4 for the crime was trivial. The panel also stated that at the time of the offense, petitioner had been
 5 using drugs.

6 All other factors weighed in favor of finding petitioner suitable for parole.
 7 Petitioner had no juvenile record. Respondent's Answer, Exhibit D. See Cal. Code Regs. tit. 15,
 8 § 2402(d)(1) (no juvenile record tends to show suitability). In addition, petitioner had a stable
 9 social history. See Cal. Code Regs. tit. 15, § 2402(d)(2) (stable social history tends to show
 10 suitability). The panel noted that petitioner came from a relatively stable home, although his
 11 father died when he was twelve. Respondent's Answer, Exhibit C, p. 20. Although petitioner
 12 was twice divorced with a twenty-five year old son with whom he was in contact, Id., pp. 27-38,
 13 this court would not characterize these circumstances as being the type of unstable social history
 14 on which to find a prisoner unsuitable for parole.

15 At the hearing, petitioner discussed his remorse. See Cal. Code Regs. tit. 15,
 16 § 2402(d)(3) (presence of remorse indicated by understanding nature and magnitude of offense
 17 tends to show suitability). Petitioner told the panel that he wished he could go back and change
 18 what happened. Id., p. 17. He stated that he had been motivated by arrogance induced by his
 19 lifestyle at the time. Id. He was not working steadily and had lost his spiritual values. Id., p. 18.

20 Petitioner's criminal history was minimal. See Cal. Code Regs. tit. 15,
 21 § 2402(d)(6) (lack of any significant history of violent crime tends to show suitability). In 1971,
 22 petitioner was arrested for refusing to submit to induction. Respondent's Answer, Exhibit D. He
 23 was not convicted of this offense. Id. In 1983, petitioner was arrested for possession of cocaine
 24 and possession of a hypodermic needle. Id. These charges were dismissed for lack of evidence.

25 Id.

26 Id.

1 Petitioner had realistic plans for the future. See Cal. Code Regs. tit. 15,
 2 § 2402(d) (realistic plans or development of marketable skills tends to show suitability).
 3 Petitioner told the panel that upon release he planned to use the services of Samaritan House in
 4 San Mateo, which appears to be a half-way house. Respondent's Answer, Exhibit C, p. 28.
 5 Petitioner could also live with his mother in El Dorado County. Id. Petitioner also had a letter
 6 from Illuminata Films in Sausalito. Id., p. 32-33. The letter, written by Executive Producer Ann
 7 Rogers, stated that she met petitioner in 1999 when she volunteered with the Alternatives to
 8 Violence Project at San Quentin. Id., p. 33. She agreed to pay petitioner \$15.00 an hour for 30
 9 hours a week to provide computer and office assistance to Illuminata. Id. She wrote, "Carl's
 10 computer skills and gifted writing ability will be a tremendous asset to our operation. In
 11 addition, Carl is welcome to occupy the extra bedroom in my Mill Valley home, if that suits his
 12 parole specifications." Id., pp. 33-34.

13 The psychological report prepared by Dr. Flax in 1999, which the 2001 panel
 14 considered, indicated that petitioner was suitable for parole. See Respondent's Answer, Exhibit
 15 C, p. 25 (discussion of Flax report by panel). See Cal. Code Regs. tit. 15, § 2402(c)(5) (lengthy
 16 history of severe mental problems related to offense tends to show unsuitability). A copy of this
 17 report is attached to the answer as Exhibit E. Dr. Flax concluded,

18 It appears to this writer that Mr. Irons possesses the skills,
 19 maturity, and social support necessary to be successful if released
 20 to the community. He has grown up in many ways throughout his
 21 years in prison and has developed plans for his future life as a law-
 22 abiding citizen in the community.

23 The panel also referred to the Life Prisoner Evaluation Report prepared by prison
 24 Counselor Sorgdrager for petitioner's 2001 suitability hearing. Id., p. 23 (discussing report). This
 25 report supported a finding that petitioner was suitable for parole based on his conduct in prison.
 26 See Cal. Code Regs. tit. 15, § 2402(c)(6) (serious misconduct in jail tends to show unsuitability).
 A copy of this report is attached to respondent's answer as Exhibit D. In this report Counselor
 Sorgdrager described petitioner's custody history:

Irons was originally received in CDC on 05/08/85. He was processed through the Northern Reception Center at the California Medical Facility and then transferred to the Correctional Training Facility for Level IV programming. He was subsequently transferred to California Medical Facility-South for Level III programming and was transferred to San Quentin (SQ)-II for Level II programming on 03/26/93. His initial review established his custody at Close B due to the length of his term. Iron's custody was reduced to Medium-A on 06/06/88 due to his positive programming and he has maintained Medium A custody since that time. Irons has held clerical positions in the following areas: Assignment Lieutenant's office, Computer Room, Procurement, Education, Prison Industry Authority (PIA), Data Processing, Vocational Machine and is currently assigned to Vocational Printing. Irons has also completed a course in Electronic Data Processing. Work Supervisor Reports throughout his incarceration indicate above average to exceptional job performance.

Respondent's Answer, Exhibit D.

In his report Counselor Sorgdrager also noted that the probation officer's report indicated that petitioner tended to see people as either friends or enemies, and that he clearly viewed the couple who owned the house as friends. Id. Counselor Sorgdrager states, "This is probably the most significant factor that led to his commission of this crime." Id. The panel asked petitioner if he agreed with this observation. Respondent's Answer, Exhibit C, p. 21. Petitioner responded that there was some truth to it. Id. He told the panel that he tends to be very loyal to his friends. Id. He also stated, "To at least some extent, I've learned that I don't have to get along with everybody in the world and that doesn't mean that they're my enemy. We just can go our separate ways." Id. The court does not find that the counselor's observation and petitioner's response in any way undercut Dr. Flax's conclusion that petitioner was suitable for release.

Counselor Sorgdrager's report also described petitioner's therapy and self help activities:

Irons has participated in the following programs: Alcoholics Anonymous 05/90, 05/91; Men's Violence Prevention Seminar (ten weekly sessions) 07/92; Breaking Barriers 08/92; Victim/Offender Reconciliation Group 12/92; Gavel Club, 12/94-02/99; Walk-A-Thon '96, 05/96; Alternatives to Violence, 08/96;

1 Advance Alternative to Violence, 12/96; and Alternatives to
 2 Violence Training for Co-facilitators Workshop, 07/97. Basic
 3 Alternatives to Violence Inside Co-facilitator 7/98, 10/98, 5/99.
 4 4/00, 6/00, Spirituality Class 4/99, 10/99 Irons has certificates in
 completion in the following areas: Electric Data Processing
 6/21/90; Principle Copy Planning 6/30/97; Cold Type Composition
 (Photo Typesetting) 9/30/97 Proofreading and Correction 12/31/97.

5 Respondent's Answer, Exhibit D.

6 In his report, Counselor Sorgdrager stated that petitioner had received one serious
 7 CDC disciplinary report on November 2, 1985, for delaying close custody counts. Id. No other
 8 disciplinary report were noted. Id.

9 In his summary, Counselor Sorgdrager concluded that petitioner would pose a low
 10 degree of threat to society if paroled:

11 Irons behavior while incarcerated has been conforming and his
 12 programming has been exceptional. He maintains an excellent
 rapport with both staff and inmates and constantly strives toward
 personal growth.

13 The callousness of Irons crime cannot be overlooked. However,
 14 the major changes in his violence potential, as documented in his
 psychiatric reports, cannot be diminished nor denied.

15 In his first psychiatric report dated 01/24/89, Dr. Martin
 16 documents, "If he is to be released, I feel that his potential for
 violence is greater than that of the average inmate because of his
 17 not coming to terms with his crime and its meaning for him."
 18 Whereas, in Irons most recent psychiatric report dated 07/15/99,
 Dr. Flax states, "It appears to this writer that Mr. Irons possess the
 skills, maturity, and social support necessary to be successful if
 19 released to the community. He has grown in many ways
 throughout his years in prison . . ." Under the category labeled, If
 20 Released to the Community: Dr. Flax writes, Mr. Irons gives no
 indication of being dangerous if released to the community. It also
 cannot be ignored that the investigating Detective Sergeant, on
 21 Irons case, stated in court that he did not feel that Irons would be a
 threat in the future. This was stated on May 1, 1985, fifteen (15)
 22 years ago. After spending 15 years being involved in self-help
 groups, alternatives to violence groups, and other non-violence
 23 oriented groups, I feel that statement is truer now then it was at the
 24 time the Detective Sergeant uttered it.

25 /////

26 /////

1 Taking into account the commitment offense, the minimal criminal
 2 history adjustment to prison, programming efforts, and the
 3 psychological report dated 07/15/99, by Dr. Flax, I believe that
 4 Irons will pose a low degree of threat to society if paroled.

5 Respondent's Answer, Exhibit D.

6 The Deputy District Attorney attending petitioner's 2001 suitability hearing stated
 7 that his office would submit the issue to the discretion of the panel. Respond
 8 Exhibit C, p. 49. In other words, the District Attorney's Office did not oppos
 9 suitability.

10 In finding petitioner unsuitable, the panel stated that it was troubled by
 11 petitioner's response to questions from his counsel asked during the hearing regarding whether
 12 he would kill somebody again. The panel stated that petitioner's answer of "I don't think so"
 13 was not very convincing. The court will set forth below the exchange the panel is referring to:

14 Attorney: You gave the impression, in response to one of the
 15 questions, almost that if it wasn't [the victim], that it might have
 16 been somebody else. Was that the impression that—that you made,
 17 or intended to give?

18 Petitioner: Looking back on it, after the fact, I—now, I guess that
 19 those two questions relate to each other. Looking back, I realize
 20 that I was responsible. And in that sense, it could have been
 21 somebody else. I mean, I don't mean I was going to kill somebody
 22 at random, but the circumstances—some set of circumstances that
 23 led me to that rage, I was primed for it. I was—I had let myself
 24 become that person who could kill and it could have been
 25 somebody else. I'm fortunate that it wasn't.

26 Attorney: Do you have any of that rage now?

Petitioner: *I don't think so.* I try to make a real effort to examine
 my motives, to look inside of myself...

Respondent's Answer, Exhibit C, pp. 45-46.

The court does not agree with the panel's finding that petitioner's comments
 suggested that he was not sure if he was capable of killing again. In fact, earlier in the hearing
 when directly asked if he could kill again petitioner answered unequivocally "no."

1 Presiding Commissioner Munoz: It's—well, you were overcome
2 with anger, no doubt, and you killed a man. Would you do that
today?

3 Petitioner: No.

4 Id., p. 17.

5 In finding petitioner unsuitable at this fifth parole suitability hearing, the panel
6 relied exclusively on unchanging factors: the commitment offense and petitioner's drug use at the
7 time of the offense. In Biggs, the Ninth Circuit stated that the BPT was "initially justified" in
8 finding Mr. Biggs unsuitable based on the circumstances of the offense and his conduct prior to
9 imprisonment. 334 F.3d at 916 (emphasis added). However, the Ninth Circuit was not specific
10 as to when reliance on the circumstances of the offense and conduct prior to imprisonment would
11 "run contrary to the rehabilitative goals espoused by the prison system" and result in a due
12 process violation. 334 F.3d at 917.

13 More important to the undersigned in assessing any due process violation is the
14 fact that continuous reliance on unchanging circumstances transforms an offense for which
15 California law provides eligibility for parole into a de facto life imprisonment without the
16 possibility of parole. The court asks rhetorically—what is it about the circumstances of
17 petitioner's crime or motivation which are going to change? The answer is nothing. The
18 circumstances of the crimes will always be what they were, and petitioner's motive for
19 committing them will always be trivial. Petitioner has no hope for ever obtaining parole except
20 perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious
21 or the motive was more than trivial. Given that *no one* seriously contends lack of seriousness or
22 lack of triviality at the present time, the potential for parole in this case is remote to the point of

23 ////

24 ////

25 ////

26 ////

1 non-existence. Petitioner's liberty interest should not be determined by such
2 possibility.²

3 In the instant case, the BPT has apparently relied on these unchanging factors at
4 least four prior times in finding petitioner unsuitable for parole. Petitioner has "continue[d] to
5 "demonstrate exemplary behavior and evidence of rehabilitation." 334 F.3d at 916. Under
6 these circumstances, the continued reliance on these factors at the 2001 hearing violated due
7 process.

8 Finally, the one other reason given by the BPT for parole denial—the need for
9 more therapy such that petitioner can face, discuss, understand and cope with stress in a
10 nondestructive manner—is devoid of any medical or other evidence in support. The conclusion
11 appears to be simply one repeated often in order to add another factor to the non-suitability
12 conclusion. Clearly, a conclusion by lay BPT commissioners that petitioner has not yet achieved
13 required therapy for insight or other reasons is not reasonably sustainable, and a state court's
14 conclusion to the contrary is patently unreasonable.

15 Respondent argues that the instant petition should be denied as moot because
16 petitioner has had two subsequent parole suitability hearings. Under Article III, § 2 of the
17 Constitution, an action is moot if it no longer presents a case or controversy. "Once a convict's
18 sentence has expired, however, some concrete and continuing injury other than the now-ended
19 incarceration or parole—some 'collateral consequence' of the conviction—must exist if the suit
20 is to be maintained." Spencer v. Kemna, 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998).

21 Petitioner is still in custody as a result of the 2001 suitability hearing. That he has
22 had two suitability hearings since that time does not render his challenge to the 2001 hearing

23
24 ² To a point, it is true, the circumstances of the crime and motivation for it may indicate a
25 petitioner's instability, cruelty, impulsiveness, violent tendencies and the like. However, after
26 fifteen or so years in the caldron of prison life, not exactly an ideal therapeutic environment to
say the least, and after repeated demonstrations that despite the recognized hardships of prison,
this petitioner does not possess those attributes, the predictive ability of the circumstances of the
crime is near zero.

1 moot. See Hubbart v. Knapp, ___ F.3d ___, 2004 WL 1801889 (9th Cir. 2004) (expiration
 2 of SVP commitment term did not moot petitioner's case regarding the expired commitment
 3 proceedings even though new proceedings had been commenced). Moreover, petitioner was
 4 found unsuitable after the 2002 hearing on the same grounds as the 2001 decision was based.
 5 See Transcript from March 20, 2002, hearing, respondent's answer, Exhibit S. However, the
 6 panel conducting the 2002 hearing additionally found that petitioner required additional AA and
 7 NA programming. Id., decision of panel, p. 7. No evidence submitted at the hearing supported
 8 this recommendation. In fact, Dr. Flax's report, on which the 2002 panel relied, stated that
 9 petitioner had no known substance abuse treatment needs. Respondent's Answer, Exhibit E.

10 At the 2002 hearing, the Deputy District Attorney who actually prosecuted
 11 petitioner appeared and spoke in favor of petitioner's release on parole. Deputy District Attorney
 12 Wagstaffe stated, in part,

13 And that is. I say at many other parole hearings. I don't want to
 14 say somebody is okay to be paroled until I can tell you I would feel
 15 comfortable with that person living on my street, as my next door
 16 neighbor. And I do hold that standard. And that's a standard I hold
 17 today. And if life would have it that Carl Irons was my next door
 18 neighbor or I heard that he was going to move next door to me, my
 view to you would be I'm going to have a good neighbor; not
 that-Don't let that happen. And realizing that within myself, that's
 why I (indiscernible) this is on behalf of our office and our county,
 that we do not pose any objection to you-if you choose, based on
 all the factors you have to look at.

19 Id., pp. 70-71.

20 The 2003 panel found petitioner unsuitable for parole on the same grounds as the
 21 2001 decision was based. Respondent's Answer, Exhibit 6. However, the panel also found
 22 petitioner unsuitable because he had received a prison disciplinary since his last hearing. Id.,
 23 decision, p. 2. In particular, petitioner was found guilty of over familiarity with prison staff. Id.,
 24 p. 34. At the hearing, petitioner discussed the disciplinary with the panel. Petitioner's female
 25 supervisor filed the charge against him after petitioner engaged in conduct which apparently
 26 made her uncomfortable. Id., p. 38. Petitioner stated that before he began working for her, he

1 realized that there could be a problem because she was younger and more attractive than most of
 2 the women he had worked around. Id., p. 38. Because he did not trust his socialization skills
 3 having been in prison for so long, he asked her to tell him if he did anything inappropriate. Id.
 4 About one month later, she told him that he was doing something to make her uncomfortable. Id.
 5 Petitioner told her that if it happened in the future, she should tell him again. Id. The next thing
 6 that happened was the "incident" that resulted in the rules violation report. Id.

7 It is unclear to the court what the "incident" involved. The panel referred to a
 8 letter stating that petitioner had rubbed his supervisor's back, but it is not clear if this was the
 9 incident that led to the rules violation report. Id., p. 39.

10 The court's finding that the 2001 decision finding him unsuitable was not
 11 supported by some evidence is somewhat complicated by the prison disciplinary petitioner
 12 received approximately two years later. However, the court notes that the psychological report
 13 prepared for the 2003 hearing acknowledged the rules violation report but still concluded that
 14 petitioner would be a low risk of dangerousness upon release. Id., pp. 40-41. Because the nature
 15 of this disciplinary was not serious and did not reflect on petitioner's ability to function upon
 16 release, the court does not find that it effects the conclusions regarding the 2001 hearing.

17 Accordingly, for the reasons discussed above, the court finds that the California
 18 Supreme Court's silent denial of this claim was an unreasonable application of clearly
 19 established Supreme Court authority. The petition should be granted as to this claim.

20 B. Remaining Claims

21 Petitioner argues that Cal. Penal Code § 3041 requires the BPT to give him a
 22 parole date. Section 3041 provides that one year prior to the inmate's minimum eligible parole
 23 release date a panel consisting of at least two commissioners of the BPT shall meet with the
 24 inmate and *shall normally* set a parole release date. Petitioner appears to argue that because
 25 § 3041 provides that the BPT shall normally set parole release dates, the BPT violated due
 26 process by failing to set his parole release date.

As discussed above, California's parole scheme gives rise to a cognizable liberty interest in release on parole. Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003). "In the parole context, the requirements of due process are met if 'some evidence' supports the decision." Id. If there is not some evidence to support a decision denying parole, due process is violated. Therefore, even though California law states that the BPT shall normally set parole release dates, due process does not require the BPT to state a date where some evidence exists demonstrating that petitioner should not be paroled. Accordingly, petitioner's claim that the BPT was required to set his parole release date pursuant to Cal. Penal Code § 3041 is without merit.

Petitioner next argues that by finding him unsuitable, the BPT is making him serve a sentence that is longer than that prescribed for similar crimes of second degree murder. In support of this claim, petitioner refers to Cal. Code Regs. tit. 15, § 2403 which sets forth a matrix of base terms for second degree murder. The court construes this claim as alleging a violation of the Equal Protection Clause.

"The Constitution permits qualitative differences in meting out punishments and there is no requirement that two persons convicted of the same offense receive identical sentences." Williams v. Illinois, 399 U.S. 235, 243, 90 S. Ct. 2018, 2023 (1970). Parole considerations require only a rational relationship to legitimate state interests. McGinnis v. Royster, 410 U.S. 263, 270, 93 S. Ct. 1055, 1059-60 (1973).

In order to prevail on this claim, petitioner must demonstrate that similarly situated prisoners have been released on parole sooner than him. See McQueary v. Blodgett, 924 F.2d 829, 835 (9th Cir. 1991). In other words, petitioner must demonstrate that prisoners convicted of second degree murder based on similar circumstances have been released on parole. Petitioner has not done this. Accordingly, this claim is without merit.

Petitioner next argues that the BPT and former Governor Davis in conspiracy have pre-determined that no murder-lifer will be paroled. Petitioner argues that he was denied parole pursuant to this illegal policy. These allegations state a claim for violation of the due

process clause. See McQuillion v. Schwarzenegger, 369 F.3d 1091, 1097 (2004).

In support of this claim, petitioner submitted various exhibits. Exhibit I attached to the exhibit package filed in support of the petition is a declaration by Albert Leddy. Mr. Leddy served from 1983 to 1992 as Commissioner and then Chairman of the BPT. In his declaration, dated March 15, 1999, Mr. Leddy contends that former Governor Wilson had a no-parole policy. This declaration does not support petitioner's claim that he was denied parole in 2001 pursuant to former Governor Davis's no-parole policy.

Exhibit K submitted in support of the petition is a copy of an article from the San Francisco Examiner. This undated article quotes former Governor Davis as stating that he would be "hard-pressed to find any reason" to parole a convicted murderer. Exhibit L is a copy of an article from the Los Angeles Times which quotes former Governor Davis as stating that he believes that murderers should serve at least a life sentence. This evidence does not demonstrate a conspiracy between the BPT and former Governor Davis to deny parole to inmates convicted of murder and serving life sentences.

In In re Rosenkrantz, 29 Cal.4th 616, 128 Cal. Rptr. 2d 104 (2002), the California Supreme Court considered the trial court's finding that the Governor, in revoking the Board's grant of parole, had applied a no-parole policy. This finding was based on express quotes of the Governor expressing that all convicted murderers should serve life terms without exception, as well as the Governor's review and reversal of almost all grants of parole. 29 Cal.4th at pp. 684-685, 128 Cal. Rptr. 2d at 162-163. The California Supreme Court found this to be insufficient evidence of a no-parole policy. It reasoned that even if the quotations truly did reflect the Governor's views when he made the statements, his subsequent actions of either affirming the grant of parole or providing individualized analyses for reversing the Board's findings of suitability belied the claim that he was applying a blanket policy of reversing the grant of parole regardless of the circumstances of the particular case. 29 Cal.4th at 685, 128 Cal. Rptr. 2d at 163.

1 In Rosenkrantz, the California Supreme Court also observed that the BPT had
 2 approved a much larger number of paroles than the former Governor. 29 Cal.4th at p. 638, n. 5,
 3 128 Cal. Rptr. 2d at 124. This finding undercuts petitioner's claim that the BPT and former
 4 Governor Davis conspired to deny parole to convicted murderers serving life sentences. For
 5 these reasons, this claim has no merit.

6 Because the denial of these claims by the California Supreme Court was not an
 7 unreasonable application of clearly established Supreme Court authority, these claims should be
 8 denied.

9 Finally, petitioner argues that the Marin County Superior Court erred in twice
 10 denying his applications for petitions for writs of habeas corpus. Petitioner contends that the
 11 Superior Court should have found that the BPT improperly found him unsuitable. This claim is
 12 really further argument in support of the claim raised in the instant petition that there was
 13 insufficient evidence to support the unsuitability finding.³ Accordingly, the court will not
 14 address this claim further.

15 Conclusion

16 Because the petition should be granted, appointment of counsel is warranted to
 17 represent petitioner in the proceedings which will follow this recommendation.

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. The Office of the Federal Defender is appointed to represent petitioner;
- 20 2. The Clerk of the Court is directed to serve a copy of these findings and
- 21 recommendations on Assistant Federal Defender Ann McClintock;

22 ////

23 ////

24 _____
 25 ³ Respondent construes this claim as alleging that the Superior Court Judge was not
 26 impartial. The court does not construe this claim to be alleging impartiality by the Superior
 Court Judge.

1 IT IS HEREBY RECOMMENDED that the petition be granted as to the claim
 2 that there was not sufficient evidence to support the 2001 decision finding petitioner unsuitable
 3 for parole; the petition should be denied in all other respects.

4 Assuming the commission of no serious disciplinary infractions henceforth,
 5 especially infractions of a violent nature, BPI should be ordered to calculate petitioner's release
 6 date, and if such would have already occurred, petitioner should be released on parole.

7 These findings and recommendations are submitted to the United States District
 8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
 9 days after being served with these findings and recommendations, any party may file written
 10 objections with the court and serve a copy on all parties. Such a document should be captioned
 11 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
 12 shall be served and filed within ten days after service of the objections. The parties are advised
 13 that failure to file objections within the specified time may waive the right to appeal the District
 14 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: August 1, 2004.

16
 17 
 18 GREGORY G. HOLLOWS
 UNITED STATES MAGISTRATE JUDGE

19 GGH:kj/af
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EXHIBIT 50

In re Rosenkrantz (Superior Court)

FILED
Los Angeles Superior Court

JUN 26 2008

John A. Clarke, Executive Officer/Clerk

By Joseph M. Pulido, Deputy

JOSEPH M. PULIDO, S.C.C.
233219

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re,

ROBERT ROSENKRANTZ,

Petitioner,

On Habeas Corpus

Case No.: BH003529

ORDER RE: WRIT OF HABEAS CORPUS

The court has read and considered petitioner's Writ of Habeas Corpus filed on August 17, 2005, as well as the return and denial filed in response to the court's order to show cause.

Having independently reviewed the record, giving deference to the broad discretion of the Board of Prison Hearings ("Board") in parole matters, the court concludes that the Board's decision denying petitioner parole is not supported by "some evidence."

Petitioner is currently serving a sentence of 15 years to life with a two-year firearm enhancement following his 1986 conviction of second degree murder. Petitioner's minimum eligible parole date was January 23, 1996. Petitioner asserts constitutional claims, including the argument that the Board violated its regulations and petitioner's right to due process by its refusal to set a parole date despite its inability to find him unsuitable for parole or to deem him an unreasonable risk to public safety if paroled.

On April 25, 2005, the Board denied petitioner parole for one year. In denying petitioner parole, the Board relied upon the circumstances of the commitment offense. When determining

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1 unsuitability based on commitment offense, the Board may consider as a factor whether the
2 victim was abused, defiled or mutilated during or after the offense. (See Cal. Code Regs., tit. 15,
3 § 2402(c)(1)(C).) Here, the Board found that the victim was "abused" due to "the number of
4 times he was shot and the manner in which he was shot." In addition, the Board concluded that
5 the case "rises to the highest level of second-degree murder." The Board further stated in its
6 decision that the Deputy District Attorney and the Los Angeles Sheriff's Department opposed
7 parole. While the Board is required to consider such opposition (see Penal Code section 3042),
8 that opposition is not a factor on which the Board may rely to deny parole as enumerated in title
9 15, section 2281 of the California Code of Regulations.

10 Towards the conclusion of the hearing, the Board summarily mentioned its concern that
11 petitioner is a danger to his brother, Joey. The court finds that this assertion is not only
12 unsupported by the record, but belied by the record, which contains documented evidence that
13 contradicts any fear that the petitioner is a threat to his brother's safety. Furthermore, the court
14 rejects the Board's inference that the absence of yearly supportive letters from petitioner's
15 brother shows that petitioner is a danger to his brother. In fact, the petitioner's denial and
16 traverse draws attention to a recent psychological evaluation addressing and dismissing the
17 Board's concern for the safety of petitioner's brother. However, because this psychological
18 evaluation was not evidence before the Board at the time of petitioner's hearing, the court may
19 not properly rely upon it in reviewing the Board's decision. Regardless, the court finds that there
20 is no evidence in the record that supports the conclusion that petitioner remains a danger to his
21 brother.

22 The Board's sole reliance on the gravity of the offense to justify denial of parole can be
23 initially justified as fulfilling the requirements set forth by state law. (*Biggs v. Terhune* (9th Cir.
24 2003) 334 F.3d 910, 916.) However, over time, should petitioner continue to demonstrate
25 exemplary behavior and evidence of rehabilitation, denying a parole date simply because of the
26 nature of the commitment offense raises serious questions involving his liberty interest in parole.
27 (*Id.* at p. 917.) Here, petitioner's record is replete with reports of petitioner's exemplary conduct
28 as well as his vocational and educational achievements over a period of many years. Indeed,

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1 petitioner is a model prisoner in every respect. A parole decision supported by some evidence
2 may nonetheless abrogate due process if it did not consider and weigh all favorable evidence.
3 (*In re Capistran* (2003) 107 Cal.App.4th 1299, 1306.)

4 The court finds that petitioner's continual parole denials have been based mainly on the
5 gravity of the commitment offense, the circumstances of which can never change. Therefore, the
6 Board's continued sole reliance on the commitment offense will essentially convert petitioner's
7 original sentence of life with the possibility of parole into a sentence of life without the
8 possibility of parole. Petitioner has no chance of obtaining parole unless the Board holds that his
9 crime was not serious enough to warrant a denial of parole. (*Irons v. Warden* (E.D. Cal. 2005)
10 358 F.Supp.2d 936, 947.)

11 Prior Board panels have found petitioner suitable for parole. Petitioner was found
12 suitable for parole on June 18, 1996, but a review unit later disapproved the parole grant. At
13 subsequent hearings in 1996, 1997 and 1998, petitioner was found unsuitable for parole based on
14 the gravity of his offense. On September 9, 1999, petitioner was found unsuitable for parole but
15 the panel set his prison term. On November 18, 1999, Governor Davis reversed petitioner's
16 parole grant. On June 30, 2000, a new panel found petitioner suitable for parole, but Governor
17 Davis reversed its decision on October 28, 2000. Petitioner has now served in excess of the
18 maximum term for both second degree and first degree murder. Therefore, the commitment
19 offense should no longer function as a factor for unsuitability and in that case, it should no longer
20 operate as "some evidence" to support the Board's parole denial. Petitioner has reached the
21 point in which the denial of parole can no longer be justified by reliance on his commitment
22 offense. The Board's continued reliance on the circumstances of the offense runs contrary to the
23 rehabilitative goals espoused by the prison system and has violated petitioner's due process.

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1 Therefore, this court orders that the petition for writ of habeas corpus be, and hereby is,
2 granted.
3

4 June 26, 2006



8 Clerk to give notice.
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David S. Wesley
DAVID S. WESLEY

Judge of the Superior Court

FILED
Los Angeles Superior Court

JUL 13 2006

John A. Clarke, Executive Officer/Clerk

By *Joseph M. Pulido* Deputy

JOSEPH M. PULIDO, S.C.C.
233219

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re,
ROBERT ROSENKRANTZ,
Petitioner,

On Habeas Corpus

Case No.: BH003529

ORDER

In papers filed on July 18, 2006, petitioner requested to be released from prison on parole or suitable bail pending final disposition of this Court's order in the matter. The Court issued an order on July 24, 2006 denying petitioner's request.

Having considered the matter further, the Court orders its July 24, 2006 order vacated as it pertains to petitioner's request for release. Instead, the Court finds that petitioner's request for release is supported by some evidence and is with merit. Petitioner's request for release on parole until final disposition of this matter is granted.

As a result of this Court granting of petitioner's writ on June 26 2006, the most petitioner could have expected under normal circumstances was that the Board of Parole Hearings would grant a new hearing consistent with the Court's ruling. However, the Court has learned that petitioner has in fact again been found suitable for parole on May 25, 2006. As a result, nothing could be accomplished by ordering the Board of Parole Hearings to hold another suitability

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1 hearing. Therefore, the Court June 26, 2006 order shall be amended by adding "and the
2 petitioner be released on parole" to the last sentence of the order.

3 The clerk is to give fax and mail notice to all parties.

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6 Date: 7/27/06

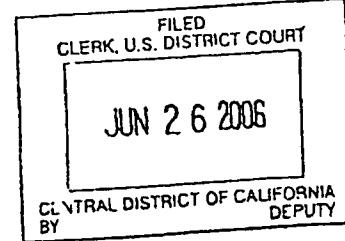


David S. Wesley
DAVID S. WESLEY
Judge of the Superior Court

EXHIBIT 51

Rosenkrantz v. Marshall

RECEIVED



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ROBERT M. ROSENKRANTZ,)	
)	
Petitioner,)	Case No. CV 05-3836-GAF(AJW)
)	
v.)	
)	
JOHN MARSHALL, Warden,)	REPORT AND RECOMMENDATION
)	OF MAGISTRATE JUDGE
Respondent.)	

Background

When petitioner was 18 years old, his younger brother, Joey, and his brother's friend, Steven Redman, secretly spied on him in order to confirm their suspicion that he was a homosexual. On the night of petitioner's high school graduation, Joey and Redman watched petitioner with a male companion through a window of petitioner's parents' beach house. Redman suggested that they enter the house and take pictures of petitioner and his companion so that they could prove to others that petitioner was gay. Before doing so, Redman and Joey obtained a flashlight and a stun gun from Joey's car. Redman then kicked in the door of the house, yelled "Get the fuck out of here you faggots," and struck petitioner with the flashlight, breaking his

1 nose. Joey burned petitioner's hands with the stun gun. Petitioner
2 obtained a BB gun from his car and attempted to prevent Redman and
3 Joey from leaving. Petitioner's father was called to the house, and
4 Redman told him that he and Joey had seen petitioner with another male
5 who had his pants down.

6 The next morning, petitioner insisted to his father that he was
7 heterosexual, and that Redman and Joey had lied. Petitioner's father
8 was extremely upset and angry. Petitioner left his parents' home. He
9 spent that night in his car. During the next few days, while he was
10 living alone in his car, petitioner obtained a firearm.¹ Petitioner
11 then confronted Redman with the firearm, demanding that he recant what
12 he had told petitioner's father. Redman refused, and continued to
13 taunt and ridicule petitioner. Eventually, petitioner shot Redman ten
14 times, killing him.

15 Petitioner was acquitted by a jury of first degree murder. He
16 was convicted of second degree murder, and sentenced to fifteen years
17 to life, plus a two year term for using a firearm.

18 In the two decades since his crime, petitioner has had a perfect
19 prison record. He has never committed a violent act or engaged in any
20 other conduct warranting discipline. While in prison, he has earned
21 an A.A. degree from Chapman College, and a B.S. degree in computer
22 science from Columbia Southern University. He has completed every
23 therapy and self-help program available, and he has obtained numerous
24 vocational certifications. Petitioner has received exceptional work
25 reports, including special recognition for developing software
26 programs for staff training, tracking sexually violent predators, and
27

28 ¹ The firearm was an Uzi.

1 managing the inmate welfare fund.

2 From 1989 to 2004, petitioner was evaluated by numerous
3 psychologists. All opined that petitioner's offense was the result of
4 an extremely stressful, isolated incident, presenting specific
5 situational factors which were unlikely to recur, and that his offense
6 did not reflect a "tendency toward violent behavior." [Petitioner's
7 Exhibit ("Ex.") E (petitioner's psychological reports) at 3-4, 6, 9,
8 12, 14, 15]. The psychologists who examined petitioner unanimously
9 concluded that petitioner's level of dangerousness was very low, using
10 terms such as "nil," "no higher than the average person in the
11 community," or "very low to nonexistent." [Petitioner's Ex. E at 3-4,
12 6, 9, 12, 14, 15].

13 Petitioner also has earned glowing recommendations from all of
14 his prison correctional counselors, who, like the psychologists, have
15 opined that petitioner presents no more risk of danger than the
16 average person in the community. [Petitioner's Ex. F (correctional
17 counselor reports including statements that petitioner "would pose
18 absolutely no threat to the public safety if released at this time,"
19 "would pose an extremely minimal threat, if any, to public safety if
20 released from prison," "would pose no threat to the public safety,"
21 and "his conduct in prison is indicative of an inmate who is ready for
22 release")].

23 Petitioner possesses realistic parole plans, including family and
24 community support, employment, a guaranteed monthly income, and a
25 residence. He has letters urging that he be granted parole from the
26 trial judge, family members, legislators, the arresting officer, and
27 the victim's grandmother. Further, although they subsequently changed
28 their minds, both the District Attorney and the Sheriff's Department

1 previously did not oppose granting petitioner parole. Finally, while
2 in custody, petitioner saved another inmate's life.

3 Not surprisingly, after petitioner's second parole suitability
4 hearing in 1996, the Board of Prison Terms ("BPT")² concluded that
5 petitioner did not pose an unreasonable risk of danger to society or
6 a threat to public safety, and that he was suitable for parole.
7 [See Petitioner's Ex. B]. As the BPT panel explained, petitioner had
8 no criminal record; a stable social history; no drug or alcohol
9 involvement; excelled in school; participated in prison programs;
10 upgraded educationally; participated extensively in self-help and
11 therapy so as to "come to an understanding of why he reacted so
12 violently" in committing his offense; received excellent work reports;
13 possessed realistic parole plans; maintained positive institutional
14 behavior indicating "significant improvement in self-control;" and
15 demonstrated acceptance of responsibility and remorse. [Petitioner's
16 Ex. B at 2-3]. The panel also found that petitioner committed the
17 crime as a result of significant stress in his life, namely, being
18 exposed as a homosexual to his father, who then rejected petitioner
19 because of the revelation. In addition, the panel noted that
20 psychological reports from 1989, 1994, and 1996 all supported release.
21 Further, the panel pointed out that the trial judge supported granting
22 parole, opining that petitioner's offense was "situational," and that
23 petitioner was "highly unlikely to re-offend." [Petitioner's Ex. B at
24 4]. Finally, the panel noted that the governor's legal advisor and
25 the district attorney supported petitioner's release. [Petitioner's

26
27 ² The Board of Prison Terms was abolished as of July 1, 2005, and
28 replaced by the Board of Parole Hearings. Cal. Penal Code § 5075(a).
Because the decision petitioner challenges was made in 2004, the Court
refers to the parole agency as the BPT.

1 Ex. B at 4]. Consequently, petitioner received a March 30, 2000 parole
2 date. [Petitioner's Ex. B at 1].

3 The 1996 decision, however, was disapproved by the BPT's decision
4 review committee, on the ground that the panel had not considered some
5 of the facts of the commitment offense. See In re Rosenkrantz, 80
6 Cal.App.4th 409, 414 n.3 (2000).

7 After parole hearings in 1996, 1997 and 1998, BPT panels found
8 petitioner unsuitable for parole. The December 1996 decision was the
9 rehearing on the panel's grant of parole earlier in 1996. One of the
10 rehearing panel members had served on the decision review committee
11 that had reversed the original panel's grant of parole. This
12 rehearing panel considered, among other things, a letter from the
13 investigating homicide detective, which addressed some of the points
14 in the review committee's decision and reflected the detective's view
15 that petitioner should be paroled. In particular, the detective
16 stated that when investigating the crime, he had found a knife on
17 Redman's body. See In re Rosenkrantz, 29 Cal.4th 616, 631 (2002),
18 cert. denied, 538 U.S. 980 (2003). Despite this additional favorable
19 evidence, the panel ultimately denied parole based upon the finding
20 that the commitment offense was carried out in a dispassionate and
21 calculated manner. See Rosenkrantz, 80 Cal.App.4th at 416 n.5.

22 The panel at the 1997 hearing included two of the three panel
23 members who had served on the decision review committee which reversed
24 the 1996 grant of parole. The new evidence presented at the hearing
25 was entirely positive. It included the District Attorney's statement
26 that he was "not opposed to this man receiving a parole date."
27 Rosenkrantz, 80 Cal.App.4th at 417. In addition, Assemblywoman Carole
28 Migden, Assemblywoman Martha Escutia, and Senator John Vasconcellos

1 wrote to the BPT and urged it to consider that, although Redman's
2 violence "obviously does not absolve [Rosenkrantz] of responsibility"
3 for Redman's death, it was a factor to be considered, and they opined
4 that "[t]he action of the Board in overturning the June 1996 decision
5 to release Mr. Rosenkrantz raises the disturbing possibility that the
6 reprehensible gay-bashing endured by Mr. Rosenkrantz is not being
7 viewed in the same light as other hate crimes, despite the fact that
8 the law of California recognizes it as an equally grave offense."
9 Rosenkrantz, 80 Cal.App.4th at 418 n.8. Nevertheless, the panel
10 denied parole, finding that (a) the offense was carried out in a cruel
11 and callous manner with a disregard for the life and suffering of
12 another, in a dispassionate and calculated manner, and (b) petitioner
13 had not sufficiently participated in beneficial self-help and therapy
14 programming. See Rosenkrantz, 80 Cal.App.4th at 418.

15 In 1998, the BPT reached a split decision, with two of the three
16 members of the panel finding petitioner unsuitable for parole. The
17 majority explained its reasoning as follows: "The number one reason
18 was the offense was carried out in a manner which exhibits a callous
19 disregard for the life and the suffering of another. These conclusions
20 are drawn from the Statement of Facts where the prisoner laid in wait
21 for the victim to come out. . . . He confronted him and, during the
22 course of the confrontation, an argument ensued [sic] and the victim
23 was subsequently shot ten times." Rosenkrantz, 80 Cal.App.4th at 418.³

24
25 ³ As the state appellate court subsequently explained, the panel
later modified its decision.

26 On October 27, 1998, the Decision Review Unit recommended a
27 "modification" of the decision. According to this report,
28 "[a]lthough the hearing panel clearly recognized that the
inmate was convicted of second degree murder, in the decision
portion of the hearing transcript, the panel inadvertently

1 The California Superior Court reviewed the 1996, 1997 and 1998
2 decisions denying parole and reversed those decisions, ordering the
3 BPT to set a parole date. The Superior Court found that the decisions
4 to deny parole were "contrary to the evidence presented at the
5 hearing" and that "[a]ll of the evidence ... indicated that the
6 defendant is not a danger to society." The Superior Court rejected
7 the BPT's reliance upon statements that the crime was "dispassionate,"
8 "calculated" and "carried out in a manner which exhibits a callous
9 disregard for the life and suffering of another," concluding that no
10 evidence supported such conclusions.⁴

11
12 stated, "... laid in wait." The recommendation was to
13 "excise" that language from the decision and replace it with
14 a statement that he "... waited in his vehicle all night
15 outside the victim's condominium complex, until the victim
emerged." The next day, the Decision Review Committee (with
Commissioner Ortega serving as one of a committee of three)
adopted the recommendation and modified the decision.

16 Rosenkrantz, 80 Cal.App.4th at 419 n.12.

17 ' As the Superior Court explained:

18 "It is difficult to imagine that any inmate could present a
19 better picture than the defendant has in terms of his
20 background, his institutional adjustment, and his parole
21 plans. However this court recognizes that no matter how
22 stellar an inmate's adjustment and progress in the institution
23 may be, it can be outweighed by the circumstances of the
24 offense. In evaluating the circumstances of the offense, the
25 Board must accept the verdict of the jury. In this case, the
26 defendant was Expressly Acquitted of First Degree Murder. The
27 jury found the defendant not guilty of premeditation and
28 deliberation. This was after a trial in which the defendant
himself testified about the circumstances of the offense. In
reading the comments of the commissioners at the last three
hearings and the statements of decision, it is apparent that
some commissioners decided on their own that the evidence
supports a finding of premeditation and lying in wait and have
based their decisions denying parole on these findings,
contrary to the express findings of the jury. The primary
reason for denying parole in all three hearings is that the
offense was 'dispassionate' and 'calculated' and/or was
'carried out in a manner which exhibits a callous disregard

SCANNED

Pursuant to the Superior Court's direction, a new hearing was

for the life and suffering of another.' "'Dispassionate' means 'free from emotion or prejudice; calm and impartial.' ... No rational person could describe this killing as calm and without emotion.... [¶] 'Calculated' means 'planned.' ... The verdict expressly rejected that the killing was planned. In finding the defendant not guilty of premeditation and deliberation, the jury must have accepted the defendant's claim that he did not go to the house planning to murder the victim. In finding him guilty of second degree murder, they found that he did not form the intent to kill until just shortly before the killing. The finding that the killing was 'dispassionate' and 'calculated' is contrary to the evidence and contrary to the verdict of the jury.

"At the last hearing of the Board of Prison Terms, the commissioners must have finally realized that this factor, that is, that the killing was 'dispassionate and calculated' was not applicable to this case. Instead they found that the 'offense was carried out in a manner which exhibits a callous disregard for the life and suffering of another.' (Of course, all second degree murders by their nature involve a disregard for the life of another.) The regulations word this factor slightly differently: 'The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.' [§ 2402, subd. (c)(1)(D).] This appears to refer to something akin to torture or that the victim suffered much more than that which would be inherent in any killing. There is no evidence of that in this case. In support of this 'callous disregard' finding, the Board stated, 'These conclusions are drawn from the Statement of Facts where the prisoner laid in wait for the victim to come out.' ... 'Lying in wait' is a special circumstance which, if found to be true by a jury, requires a sentence of life without the possibility of parole.... Apparently recognizing that this may seem inconsistent with a verdict of second degree murder, legal counsel [for the Board] recommended that 'laid in wait for the victim to come out' be deleted and replaced with 'waited in his vehicle all night outside the victim's condominium complex, until the victim emerged.' There is nothing in this case to support a finding of an exceptionally callous disregard for the suffering of another."

Rosenkrantz, 80 Cal.App.4th at 419 & n.13. The superior court also found that two commissioners who had participated in several of petitioner's parole hearings were biased against petitioner and precluded them from sitting on his parole hearings. Rosenkrantz, 80 Cal.App.4th at 420-421.

The appellate court's suggestion that the BPT could not rely upon facts that the jury had not found true beyond a reasonable doubt was subsequently rejected by the California Supreme Court. Rosenkrantz, 29 Cal.4th 616, 679 (2002).

1 held in 1999. At the hearing, additional favorable evidence regarding
2 petitioner's performance in prison was submitted, as well as
3 additional letters in support of parole, including the Sheriff's
4 Department's statement of nonopposition to parole. Rosenkrantz, 80
5 Cal.App.4th at 421. Nevertheless, the BPT panel again found
6 petitioner unsuitable for parole, explaining:

7 The number one reason, really the only reason, is the
8 commitment offense itself. You've done tremendously while
9 you've been in the institution, you've made tremendous
10 progress. But the nature of the crime itself is the reason
11 we found you unsuitable for parole. The Panel found that the
12 offense was carried out in especially cruel or callous
13 manner and that it was carried out in a dispassionate or
14 calculated manner, such as an execution style murder, and
15 that the offense was carried out in a manner which
16 demonstrates an exceptionally callous disregard for human
17 suffering...

18 Rosenkrantz, 80 Cal.App.4th at 422 n.14. [Petitioner's Ex. C at 1].
19 Although it found petitioner unsuitable for parole, the BPT panel
20 nevertheless set a June 30, 2001 parole date in compliance with the
21 Superior Court's decision. [Petitioner's Ex. C]. Former Governor Gray
22 Davis reversed the grant of parole, explaining that the finding of
23 suitability was "based solely on an order from the Los Angeles
24 Superior Court, which order is now on appeal." Rosenkrantz, 80
25 Cal.App.4th 409 at 422.

26 The California Court of Appeal subsequently affirmed the Superior
27 Court's decision, holding that the BPT's 1999 finding of unsuitability
28 was unsupported by any evidence. Rosenkrantz, 80 Cal.App.4th at 427.

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1 In discussing the appropriate remedy, the appellate court stated that
2 [a]t some point, a failure to follow the law, or
3 the continued application of an arbitrary and
4 irrational standard, will rise to the level of a
5 substantive due process violation. (Cf.
6 Stubblefield Construction Co. v. City of San
7 Bernardino (1995) 32 Cal.App.4th 687, 708-710 [38
8 Cal.Rptr.2d 413]; Pearson v. City of Grand Blanc
9 6th Cir. 1992) 961 F.2d 1211, 1216-1217.)

10 Rosenkrantz, 80 Cal.App.4th at 428-429.

11 On June 30, 2000, a new BPT panel found petitioner suitable for
12 parole, explaining that he "would not pose an unreasonable risk of
13 danger to society or a threat to public safety if released from
14 prison." The panel found that petitioner had committed his crime as
15 the result of "significant stress" in his life, that he showed remorse
16 and had accepted responsibility for his crime, and that his most
17 recent psychological report demonstrated that he was "a very low risk
18 for future violence" and "clearly not a criminally oriented
19 individual." In re Rosenkrantz, 116 Cal.Rptr.2d 69, 74 (2002). The
20 panel set petitioner's parole release date as March 30, 2001.
21 [Petitioner's Ex. D]. Former Governor Davis also reversed that
22 decision. Rosenkrantz, 116 Cal.Rptr.2d at 74.

23 Petitioner challenged former Governor Davis's decision in a state
24 habeas petition. The Superior Court granted the petition after
25 concluding that there was no evidence supporting the former Governor's
26 decision, and that the former Governor's decision was based upon an
27 impermissible general policy of automatically denying parole to
28 prisoners convicted of murder. The Court of Appeal affirmed the

1 judgment of the Superior Court. Rosenkrantz, 116 Cal.Rptr.2d at 83-
2 84. The California Supreme Court, however, reversed. Rosenkrantz, 29
3 Cal.4th at 625. It found that while there was no evidence supporting
4 some of former Governor Davis's stated reasons for finding petitioner
5 unsuitable for parole, there was some evidence supporting the former
6 Governor's finding that petitioner's offense was carried out in a
7 dispassionate and calculated manner. Rosenkrantz, 29 Cal.4th at 678-
8 679.⁵

9
10 ⁵ Justice Moreno wrote separately to emphasize the narrowness of the
decision.

11 Although I agree that evidence of premeditation and
12 deliberation supports the conclusion that petitioner's crime
13 was particularly egregious for a second degree murder, it is
14 another matter whether any evidence would support the same
15 conclusion for a first degree murder. Other than felony
16 murders, first degree murders by definition involve
17 premeditation and deliberation. Moreover, there was sufficient
18 doubt over whether premeditation and deliberation existed to
19 persuade a jury to acquit petitioner of first degree murder.
20 Furthermore, petitioner's offense did not appear to partake of
21 any of those characteristics that make an offense particularly
22 egregious under the Board of Prison Terms' parole eligibility
23 matrix for first degree murders, e.g., torture, the infliction
24 of severe trauma not involving immediate death, or murder for
25 hire. (Cal. Code Regs., tit. 15, § 2403, subd. (b).) Nor is it
26 certain that petitioner's lack of remorse immediately
27 following the crime, by itself, would make the crime
28 exceptional compared to other first degree murders. The
significance of the above observations is this: there will
come a point, which already may have arrived, when petitioner
would have become eligible for parole if he had been convicted
of first degree murder. Once petitioner reaches that point, it
is appropriate to consider whether his offense would still be
considered especially egregious for a first degree murder in
order to promote the parole statute's goal of proportionality
between the length of sentence and the seriousness of the
offense. (See In re Ramirez (2001) 94 Cal.App.4th 549, 570-571
[114 Cal.Rptr.2d 381] [in conducting parole proportionality
analysis, the court considers the gravity of the offense in
relation to the time in prison already served].) Under this
circumstance, the justification for denying his parole would
become less clear, even under the deferential "some evidence"
standard. Thus, future denials of petitioner's parole may
warrant judicial reappraisal.

On January 5, 2004, a new BPT panel found petitioner unsuitable for parole based solely upon the gravity of his commitment offense. [Petitioner's Ex. A at 113-114]. Petitioner sought habeas relief in the state courts. On October 7, 2004, the Superior Court denied petitioner's habeas petition, concluding that there was "some evidence" to support the BPT's decision - namely, "the circumstances of the life crime were such that they could reasonably be considered more aggravated or violent than the minimum necessary to sustain a conviction for second-degree murder." [Petitioner's Ex. G]. On November 15, 2004, the California Court of Appeal denied petitioner's habeas petition without explanation.⁶ [Petitioner's Ex. H]. On February 2, 2005, the California Supreme Court also rejected petitioner's claims without explanation. [Petitioner's Ex. I].⁷

Petitioner filed this federal habeas corpus petition alleging that the BPT's 2004 decision finding him unsuitable for parole violated due process. Because the BPT's 2004 decision fails to satisfy even the forgiving "some evidence" test for constitutionality prescribed by the United States Supreme Court, the petition should be granted.

The BPT's decision

The BPT began the January 5, 2004 hearing by reciting the facts

Rosenkrantz, 29 Cal.4th at 689-690 (Moreno, J., concurring).

⁶ Justice Vogel dissented, explaining that since petitioner had by then served the minimum sentence for first degree murder (a crime of which he was acquitted), the BPT should consider whether his offense was especially egregious for a first degree murder as opposed to a second degree murder. Justice Vogel also stated that he believed the petition should be granted because there was "no evidence" supporting the Board's decision. [Petitioner's Ex. H (emphasis in original)].

⁷ Justices Kennard and Moreno, however, opined that the petition should be granted. [Petitioner's Ex. I].

1 surrounding the commitment offense. Those facts, which are not in
2 dispute, are as follows:

3 At the time of the offense, petitioner was 18 years of
4 age and resided with his parents and two brothers in
5 Calabasas in Los Angeles County. Petitioner testified that
6 he knew at an early age that he was gay but also knew that
7 this circumstance was unacceptable to his family -
8 particularly to his father, whom he idolized. Petitioner
9 pretended to be heterosexual but secretly was able to
10 communicate with and meet other gay teenagers. Petitioner's
11 brother Joey, then 16 years of age, suspected that
12 petitioner was gay and shared this suspicion with Steven
13 Redman, Joey's 17-year-old friend. According to petitioner,
14 Redman was a bully and was preoccupied with hatred of
15 homosexuals, and Joey also disliked such individuals.

16 By eavesdropping on petitioner's telephone
17 conversations, Joey learned that petitioner planned to meet
18 another young male at the family's beach house on the
19 evening petitioner graduated from high school - Friday, June
20 21, 1985. Redman suggested that he and Joey go to the beach
21 house that night to investigate and gather information
22 concerning petitioner's sexual orientation. Upon arriving at
23 the beach house, Redman and Joey looked through a window and
24 observed petitioner, two other males, and one female
25 drinking and watching television.

26 When petitioner and his male companion entered a
27 bedroom, and Joey and Redman no longer could view
28 petitioner's activities, Joey wanted to leave. Redman,

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1 however, decided that he would run into the house and take
2 photographs. Before he did so, Redman and Joey retrieved a
3 flashlight and a stun gun from Joey's automobile. Joey
4 unlocked the door to the house and Redman kicked it in,
5 shouting, "Get the fuck out of here you faggots." A
6 physical confrontation ensued in which Joey burned
7 petitioner's hands by firing the stun gun, Redman struck
8 petitioner several times with the flashlight, petitioner's
9 companion punched Redman, and petitioner burned Joey on the
10 face after having gained control of the stun gun.
11 Petitioner's nose was broken during the altercation.

12 The fighting ceased when petitioner's other friends
13 intervened, but petitioner then obtained a BB gun from his
14 automobile and attempted to prevent Redman and Joey from
15 leaving the house. Joey stated that he had recorded
16 telephone calls confirming petitioner's homosexuality, and
17 that the tapes were in his automobile. Joey managed to
18 escape when petitioner accompanied him to retrieve the
19 tapes. Because petitioner had taken the keys to Joey's
20 automobile, however, Joey telephoned their father, who drove
21 to the beach house and spoke with petitioner. Petitioner
22 surrendered Joey's keys to his father. Before Redman and
23 Joey left, Redman stated to petitioner's father that he and
24 Joey had observed petitioner with another male who had his
25 pants down.

26 The next morning, petitioner insisted to his father
27 that he was heterosexual and that Redman and Joey had lied.
28 Petitioner's father, very upset by the possibility that

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1 petitioner might be gay, broke down and cried during the
2 conversation with petitioner. Petitioner and Joey had
3 decided that Joey would inform their father that the entire
4 incident had been a joke, and Joey recanted his story
5 concerning petitioner's homosexual conduct. Redman, having
6 been summoned by the boys' father, modified his story
7 regarding what he had observed the previous evening, but
8 petitioner's father gradually realized that petitioner was
9 gay. He confronted petitioner and angrily questioned him
10 regarding his activities and contacts. Petitioner gathered
11 his possessions and left the house, sleeping in his
12 automobile that night.

13 On Monday, June 24, petitioner went to a shooting range
14 and rented an Uzi semiautomatic nine-millimeter carbine.
15 Petitioner testified that he had planned to kill himself at
16 the shooting range, but then decided to use the gun to teach
17 Redman a lesson. After shooting the weapon on the firing
18 range for 10 or 15 minutes, petitioner stated to the manager
19 that he wished to purchase an Uzi and did not want to wait
20 for it to be ordered. When the manager refused to sell him
21 the weapon he had rented, petitioner left. Also on Monday,
22 petitioner visited a sporting goods store and arranged to
23 purchase an Uzi that would be available on Wednesday, June
24 26.

25 Petitioner was employed at a restaurant and worked
26 there during this period. On Tuesday, June 25, petitioner
27 stated to a coworker that he had purchased a gun and was
28 planning to kill his brother. Petitioner also informed

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1 another coworker that Redman and Joey had humiliated
2 petitioner and that he was obtaining a gun.

3 On Wednesday, June 26, petitioner obtained the Uzi he
4 had ordered and purchased 250 rounds of ammunition.
5 Petitioner testified that he telephoned Redman that night,
6 but Redman hung up on him. Petitioner thought that he might
7 use the Uzi to force Redman to recant what he had told
8 petitioner's father regarding petitioner's sexual
9 activities. On Thursday, having telephoned two individuals
10 who knew Redman, petitioner succeeded in learning where
11 Redman resided. Petitioner again telephoned Redman, who
12 refused to recant his statements regarding petitioner's
13 sexual orientation.

14 On Thursday night, petitioner traveled to the
15 condominium complex where Redman resided and unsuccessfully
16 attempted to locate Redman's vehicle. Petitioner spent the
17 night in his own automobile near the complex. The next
18 morning, June 28, when Redman was driving away from his
19 home, petitioner used his vehicle to block Redman's vehicle
20 and confronted Redman, who asked petitioner what he wanted.
21 Holding the Uzi, which was loaded and ready to be fired,
22 petitioner responded, "I think you know what I want."
23 According to petitioner, Redman called him a "faggot" and
24 said petitioner was in a lot of trouble. Petitioner twice
25 asked Redman to accompany him to petitioner's home to recant
26 what Redman had said. Redman responded, "I'm not going
27 anywhere with you, you goddam faggot." When Redman asked
28 petitioner what he was going to do with the weapon,

1 petitioner stated that he was going to use it to damage
2 Redman's car. Redman reiterated that he would not go
3 anywhere with petitioner. Petitioner then pointed the gun at
4 Redman and began shooting. Redman sustained at least 10
5 gunshot wounds, including six wounds to the head. There was
6 evidence that the Uzi had been fired at very close range.
7 Redman died from the shooting.

8 Petitioner walked away from the body and entered his
9 vehicle, still pointing the weapon at Redman. In a telephone
10 conversation that morning with Joey, petitioner cried and
11 stated that he had done something terrible to Redman. That
12 evening, petitioner telephoned a deputy sheriff who also had
13 been petitioner's teacher at school. In this conversation,
14 which was recorded, petitioner admitted the shooting and
15 expressed attitudes ranging from remorse to defiance.

16 In the weeks following the shooting incident,
17 petitioner traveled to various towns in northern California
18 and Oregon, spending time with friends. Approximately one
19 month after the shooting, petitioner, accompanied by his
20 attorney, surrendered to the investigating deputy sheriff.

21 Rosenkrantz, 29 Cal.4th at 627-629. [See Petitioner's Ex. A at 11-13].

22 The BPT next reviewed petitioner's background, noting that
23 petitioner had no criminal record, a stable social history, and no
24 history of drug or alcohol use. [Petitioner's Ex. A at 33, 38-42].
25 The BPT detailed petitioner's institutional adjustment, noting that
26 petitioner had received a vocational certificate in welding in 2003.
27 [Petitioner's Ex. A at 43-45]. The BPT noted that petitioner had
28 "always done very, very well," and had received "exceptional work

1 reports." [Petitioner's Ex. A at 46]. Petitioner had earned an A.A.
2 degree from Chapman College in 1992, and a B.S. degree in computer
3 science from Columbia Southern University in 1998. [Petitioner's Ex.
4 A at 47]. Petitioner had received proficiency certificates for word
5 processing, data processing, and computer skills. [Petitioner's Ex. A
6 at 48]. Petitioner had participated successfully in numerous self-
7 help programs dating from 1993, including Project Change, Anger
8 Management, Rational Therapy, Self-Esteem, the "ACT" program, Drug and
9 Alcohol Prevention, and HIV Prevention. [Petitioner's Ex. A at 49-50].
10 Petitioner also had "done a tremendous amount of work for the
11 institution in terms of software development." He had received "many
12 laudatory chronos" for his work. In particular, petitioner developed
13 software programs to track sexually violent predators, INS inmates,
14 disabled inmates, and the prison substance abuse program. One
15 laudatory chrono petitioner received indicated that "the work
16 [petitioner] did for the inmate trust account activity resulted in the
17 breakup of a ring of inmates bringing narcotics into the institution."
18 [Petitioner's Ex. A at 50]. As the BPT put it, "the institution has
19 greatly benefitted from [petitioner's] education. And we can see that
20 [petitioner has] tried to give back in this way." [Petitioner's Ex. A
21 at 50]. Petitioner also received a laudatory chrono for his
22 participation in the Literacy Council. Further, petitioner was
23 involved in the Inmate Peer Educator program. Finally, on December 25,
24 2001, petitioner saved the life of an inmate who was choking on a
25 piece of meat, by performing the Heimlich maneuver. [Petitioner's Ex.
26 A at 51].

27 The BPT commended petitioner for having no record of discipline
28 in prison. [Petitioner's Ex. A at 51].

1 The BPT next reviewed petitioner's latest psychological
2 evaluation, which, like every prior evaluation, was favorable. [See
3 Petitioner's Ex. F]. In particular, the evaluation reported that: SEE PAGE 188

4 Mr. Rosenkrantz has developed substantial insight into the
5 factors contributing to the instant offense. The instant
6 offense appears to be an isolated incident. ... It appears
7 that during this short interval of time lasting less than
8 one week Mr. Rosenkrantz experienced a level of stress which
9 was sufficient to override both his emotional and behavioral
10 control. It seems very unlikely, given his current level of
11 maturity, that such a sequence of events would likely recur.
12 He continues to express appropriate feelings of remorse for
13 the victim.

14 [Petitioner's Ex. A at 57-58]. In terms of an assessment of future
15 dangerousness, Dr. Rueschenberg opined that petitioner

16 is clearly not a criminally oriented individual and with the
17 exception of the instant offense he does not have a history
18 of violent behavior either within the community or in
19 prison. His score on the HARE scale places him in a very
20 low range indicating a very low risk for future violence.

21 [Petitioner's Ex. A at 58-59]. As the BPT summarized the medical
22 evidence, petitioner posed "virtually no threat to the public" if
23 released from prison. [Petitioner's Ex. A at 60].

24 The BPT inquired about petitioner's parole plans. Petitioner's
25 parents had offered to house petitioner in their home in Calabasas,
26 California. [Petitioner's Ex. A, at 61]. Petitioner had a job offer
27 from the Greenspan Company to perform computer work. [Petitioner's Ex.
28 A at 62-63]. Petitioner also had income from property of about \$4,500

1 a month, so he had the means to support himself. [Petitioner's Ex. A
2 at 63-64].

3 Petitioner received numerous letters of support, including from
4 members of the public, Assemblywoman Jackie Goldberg, State Senator
5 Sheila James Kuehl, and Superior Court Judge Albracht, who presided
6 over petitioner's trial. [Petitioner's Ex. A at 67-71]. Captain Frank
7 Merriman of the Los Angeles Sheriff's Department sent a letter
8 opposing petitioner's parole. [Petitioner's Ex. A at 71-72]. Finally,
9 a deputy district attorney indicated that the District Attorney of Los
10 Angeles opposed parole. [Petitioner's Ex. A at 88-98].⁸

11 After considering this evidence, the panel found petitioner
12 unsuitable for parole. The panel offered the following explanation
13 for its decision:

14 The offense was carried out in an especially cruel and
15 callous manner. This was a planned assault on the victim.
16 The prisoner lied [sic] in wait, waited outside of his home
17 until the - until the victim, Mr. Redman, came out, and then
18 he shot him, not once, but repeatedly, at least 10 times
19 with an Uzi. The offense was carried out in a dispassionate
20 and a calculated manner such as an execution style murder.
21 And we say that knowing that this was a second degree
22 murder. But the four shots that was [sic] fired into the
23 victim as he laid helpless on the street certainly in the
24 mind of his [sic] Commission indicates that is was an
25 execution style murder. And with that we note the victim

26
27 ⁸ The Sheriff's Department and the District Attorney's Office
28 previously had not opposed granting petitioner parole, but both reversed
position. The record reflects no reason for this reversal. [See
Petitioner's Ex. D at 3-4].

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1 was abused. Any time a victim is shot 10 times certainly we
2 consider that abusive. The offense was carried out in a
3 manner that demonstrates a total callous disregard for
4 another human being or for the suffering of a human being or
5 a callous disregard for the laws and rules that's [sic]
6 established for an organized - a well ordered society, an
7 Uzi in an urban area. The motive for the crime is
8 inexplicable. The conclusions were drawn from the Statement
9 of Facts wherein the prisoner apparently had an altercation
10 with the victim and his brother in which he was eventually
11 - Mr. Rosenkrantz was eventually, for lack of a better word,
12 outed as a homosexual. And this was - this information was
13 conveyed to the prisoner's father and as a result this
14 caused some turmoil in the home and apparently the prisoner
15 left the home as a result and he was - in an attempt to get
16 his brother and the victim, Mr. Redman, to recant their
17 statements the prisoner planned this assault. He went to
18 a firing range, he practiced, he - he attempted to purchase
19 an Uzi. And the first time he was not successful. He tried
20 again and he eventually was successful in purchasing an Uzi.
21 He bought numerous rounds of ammunition for this weapon.
22 And on the day of the offense he waited outside the victim's
23 home until the victim came out. And when he came out, he
24 encountered him and at least 10 rounds was [sic] fired, four
25 of which was [sic] while the victim was laying on the
26 ground, it was in the victim's head. The prisoner had no
27 previous occasion of inflicting injury on a victim. He had
28 no record of violent behavior. In fact, the prisoner had no

juvenile record, nor did he have an adult record. He had no history of any kind of criminality. Now in terms of an unstable social history or prior - Prior criminality we already talked about. But in terms of unstable social history, there's no indication that the prisoner had an unstable social history. Quite to the contrary. Everything I can read indicate [sic] that the prisoner had a stable social history. Both parents was [sic] in the home. It appeared that he grew up in a loving home. So there's no indications that - He did well in school. He was accepted to college. So there was no indication of an unstable social history. Now, the prisoner has programmed. The prisoner has programmed in a commendable manner. A recent psychological report - The most recent psychological report, August of '99, by Dr. Rueschenberg, R-U-E-S-C-H-E-N-B-E-R-G, it says that the prisoner's assessment of dangerousness is low. Dr. Lance Portnoff, P-O-R-T-N-O-F-F, completed a report in - on 8-1988, good report, shows that his level of dangerousness in the community is reduced. Certainly we feel that the prisoner has realistic parole plans. He have [sic] a very loving relationship with his parents apparently, and he have [sic] residential plans and he have [sic] means of employment. And certainly we feel that with his welding skill and with his computer skills and with his B.A. Degree in computers that he have [sic] the means of supporting himself. He have [sic] marketable skill should he be released. The hearing Panel notes that in response to Penal Code 3042 Notices indicating opposition to a finding of

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1 parole suitability, specifically one, the Deputy District
2 Attorney made a very compelling argument against
3 suitability, from Los Angeles. There's also a letter in the
4 file from the Los Angeles Sheriff's Department - Sheriff
5 Department in opposition of a finding of suitability. The
6 Panel makes the following findings. The Panel finds that
7 the prisoner have [sic] made phenomenal progress. That he
8 needs to continue in the mode that he's in, continue to
9 participate in self-help programs and other kinds of
10 programs, the kinds of programs that would enable him to be
11 able to face, discuss, understand and cope with stressful
12 situations such as the offense, the commitment offense, the
13 kind that brought him to prison, in a nondestructive manner.
14 We feel he's making progress in this area. Undoubtedly he
15 will reach a point sometime in the near future where he will
16 be found suitable again. Until some Panel feels that the
17 prisoner have [sic] made enough progress, the Board still
18 finds that there is a certain amount of unpredictability
19 there and therefore the possibility of threat to others.
20 Nevertheless, we certainly need to commend the prisoner for
21 his outstanding behavior in prison. No disciplinaries, no
22 128 chronos, a B.A. Degree from Columbia in computer
23 science, an A.A. Degree from Chapman, he was already a high
24 school grad when he came to prison, gets good work reports.
25 Apparently he worked as a literacy counsel for the inmates.
26 He works on computer programs for the institutional staff
27 and they've wrote [sic] him good chronos. Somewhere in the
28 file, as it was articulated, he even saved an inmate's life

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1 by using the Heimlich maneuver. So certainly all of those
2 things point to suitability. However, those positive
3 aspects of his behavior does not [sic] outweigh the fact of
4 unsuitability. The prisoner's parole is going to be denied
5 for one year. And the Panel recommends that he remain
6 disciplinary -free, that he continue to participate in self-
7 help programs. Now this one year denial, certainly the
8 crime had a lot to do with that, the manner in which the
9 prisoner carried out the crime, the gravity of the offense
10 certainly weighed heavy on the minds of the Panel members.
11 Certainly - And speaking of the gravity of the offense, the
12 manner in which the prisoner purchased the weapon, trained
13 himself to use the weapon, approached his victim, shot his
14 victim six times, then four more times as he laid [sic] on
15 the street, certainly weighed heavy [sic] on the Board's
16 mind. Also, the petitioner's rendition of whether or not
17 his brother was in danger certainly weighed heavy on the
18 Panel's mind. When I say his brother, whether or not the
19 prisoner is actually going to do harm to him. Now, the
20 prisoner can't change what have [sic] occurred in the past.
21 It appears that he's doing everything to make himself
22 suitable, but certainly in my mind today there's still some
23 unanswered questions. And I think the prisoner is making
24 progress. However, I still think he have [sic] some - some
25 ways to go.

26 [Petitioner's Ex. A at 113-119].⁹

27 _____
28 ⁹ It appears that petitioner had a parole hearing after the decision
challenged in this petition. [Memorandum in Support of Petition at 22 n.

Petitioner's Contentions

Petitioner alleges that he was denied due process because (1) the BPT's finding that petitioner poses an unreasonable risk of danger is not supported by any evidence, since all of the evidence shows that petitioner would pose no threat to public safety if released; (2) each ground relied upon by the BPT to deny parole lacked support; (3) the BPT relied solely upon petitioner's commitment offense; (4) petitioner's commitment offense was not particularly egregious for a first-degree murder, and petitioner already has served the minimum term for such offense; (5) there is no nexus between petitioner's offense and petitioner's parole risk; and (6) the BPT failed to base its decision on a preponderance of the evidence or its codified suitability criteria. [Memorandum in Support of Petition at 11-27].

Standard of Review

This Court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an

11 (noting that petitioner was denied parole on April 25, 2005)). This subsequent parole denial does not render this petition moot. First, petitioner is still in custody as a result of the 2004 decision, the decision he challenges in this petition. Second, petitioner's claims challenging the denial of parole fall within the "capable of repetition yet evading review" exception to mootness. See Hubbart v. Knapp, 379 F.3d 773, 777 (9th Cir. 2004) (habeas petition challenging a two-year commitment under California's Sexually Violent Predator Act was found to "evade review" because the duration of the commitment was too short to be fully litigated prior to its expiration), cert. denied, 543 U.S. 1071 (2005).

1 unreasonable determination of the facts in light of the evidence
2 presented in the State court proceeding." 28 U.S.C. § 2254(d).
3

4 The Supreme Court has explained that section "2254(d)(1)"'s
5 'contrary to' and 'unreasonable application' clauses have independent
6 meaning." Bell v. Cone, 535 U.S. 685, 694 (2002).

7 Under the "contrary to" clause, a federal habeas
8 court may grant the writ if the state court arrives
9 at a conclusion opposite to that reached by this
10 Court on a question of law or if the state court
11 decides a case differently than this Court has on a
12 set of materially indistinguishable facts. Under
13 the "unreasonable application" clause, a federal
14 habeas court may grant the writ if the state court
15 identifies the correct governing legal principle
16 from this Court's decisions but unreasonably
17 applies that principle to the facts of the
18 prisoner's case.

19 Williams v. Taylor, 529 U.S. 362, 412-413 (2000); see Lockyer v.
20 Andrade, 538 U.S. 63, 73-76 (2003).

21 While only Supreme Court precedent is controlling under the
22 AEDPA, other case law is persuasive authority "for purposes of
23 determining whether a particular state court decision is an
24 unreasonable application of Supreme Court law." Vlasak v. Superior
25 Court of California ex rel. County of Los Angeles, 329 F.3d 683, 687
26 (9th Cir. 2003) (quoting Luna v. Cambra, 306 F.3d 954, 960 (9th Cir.
27 2002) (internal quotation marks and citation omitted), amended, 311
28 F.3d 928 (9th Cir. 2002)); see Bruce v. Terhune, 376 F.3d 950, 956
29 (9th Cir. 2004) ("Although only the Supreme Court's precedents are

1 binding on state courts under AEDPA, our precedents may provide
2 guidance as we review state-court determinations.").

3 Where, as here, a higher state court has denied a claim without
4 explanation, federal courts "look through" that denial to the last
5 reasoned state decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-
6 806 (1991); Shackleford v. Hubbard, 234 F.3d 1072, n.2 (9th Cir.
7 2000), cert. denied, 534 U.S. 944 (2001).

8 Discussion

9 The Due Process Clause of the Fourteenth Amendment prohibits
10 state action that deprives a person of life, liberty, or property
11 without due process of law. A person alleging a due process violation
12 must first demonstrate that he or she was deprived of a liberty or
13 property interest protected by the Due Process Clause, and then show
14 that the procedures that led to the deprivation were constitutionally
15 insufficient. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454,
16 459-460 (1989); McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir.
17 2002).

18 In the parole context, a prisoner alleging a due process claim
19 must demonstrate the existence of a protected liberty interest in
20 parole, and the denial of one or more of the procedural protections
21 that must be afforded when a prisoner has a liberty interest in
22 parole. The Supreme Court held in 1979, and reiterated in 1987, that
23 "a state's statutory scheme, if it uses mandatory language, creates a
24 presumption that parole release will be granted when or unless certain
25 designated findings are made, and thereby gives rise to a
26 constitutional liberty interest." McQuillion, 306 F.3d at 901 (citing
27 Greenholtz v. Inmates of Nebraska Penal, 442 U.S. 1, 7 (1979) and
28

1 Board of Pardons v. Allen, 482 U.S. 369, 373 (1987)).¹⁰

2 The Ninth Circuit has held that California's parole scheme
3 creates a cognizable liberty interest in release on parole because
4 Penal Code § 3041 uses mandatory language and is similar to the
5 Nebraska and Montana statutes addressed in Greenholtz and Allen,
6 respectively. McQuillion, 306 F.3d at 901-902. As the Ninth Circuit
7 has explained, "Section 3041 of the California Penal Code creates in
8 every inmate a cognizable liberty interest in parole which is
9 protected by the procedural safeguards of the Due Process Clause," and
10 that interest arises "upon the incarceration of the inmate." Biggs v.
11 Terhune, 334 F.3d 910, 914-915 (9th Cir. 2003).

12 Respondent contends that McQuillion is no longer good law because
13 of an intervening decision of the California Supreme Court. [Answer at
14 5-8]. It is true, of course, that after the Ninth Circuit's decision
15 in McQuillion, the California Supreme Court addressed a portion of the
16 California parole statute in In re Dannenberg, 34 Cal.4th 1061 (2005),
17 cert. denied, 126 S.Ct. 92 (2005). That decision, however, does not
18 mean what respondent says it means, and it does not undercut
19 McQuillion.

20 In Dannenberg, the California Supreme Court held that the BPT
21 need not engage in a "uniform term" analysis under section 3041(a) if
22 it determines that public safety concerns warrant denial of parole
23 under section 3041(b). Dannenberg, 34 Cal.4th at 1082-1094. The court
24

25 ¹⁰ Respondent argues that in Sandin v. Conner, 515 U.S. 472 (1995),
26 the Supreme Court criticized the mandatory language methodology described
27 in Greenholtz and Allen, and that under Sandin, California has not
28 created a protected liberty interest in parole. [Answer at 8-10]. The
Ninth Circuit, however, has rejected that argument, explaining that
Sandin's holding is limited to internal prison disciplinary regulations.
McQuillion, 306 F.3d at 903.

1 did not hold that there is no protected liberty interest in parole
2 whatsoever. It simply held that, at least under some circumstances,
3 the BPT was not required to compare one inmate's parole suitability
4 with the parole suitability determinations given to other inmates who
5 had been convicted of similar crimes. See Dannenberg, 34 Cal.4th at
6 1098 n. 18. Indeed, California courts have continued to analyze claims
7 regarding denial of parole under due process standards, even after
8 Dannenberg. See In re Scott, 133 Cal.App.4th 573, 590-591, 603 (2005)
9 (citing Dannenberg and granting habeas relief because "some evidence"
10 did not support the Governor's finding that the circumstances of the
11 murder made the petitioner unsuitable for parole); In re DeLuna, 126
12 Cal.App.4th 585, 593-598 (2005) (citing Dannenberg and remanding to
13 the BPT to reconsider parole decision in compliance with due process
14 requirements regarding "some evidence"). Moreover, even in Dannenberg
15 itself, the California Supreme Court reached the issue whether there
16 was "some evidence" supporting the parole suitability determination,
17 thus indicating that due process requirements still apply to parole
18 determinations in California. Dannenberg, 34 Cal.4th at 1095-1096.

19 Furthermore, Dannenberg's holding is limited to the uniform term
20 provision of section 3041(a). In reaching its determination that the
21 California parole scheme creates a liberty interest protected by the
22 Due Process Clause, the Ninth Circuit only considered the language of
23 section 3041(b). McQuillion, 306 F.3d at 902. Because the California
24 Supreme Court did not reinterpret section 3041(b), and because the
25 reasoning in McQuillion is based solely on section 3041(b), Dannenberg
26 does not undermine the Ninth Circuit's decision. Therefore, the Ninth
27 Circuit's holding in McQuillion that the mandatory language of section
28 3041(b) creates a liberty interest in parole remains controlling

1 precedent. See, e.g., Blankenship v. Kane, 2006 WL 515627, at *3
2 (N.D.Cal. 2006) (stating that "[b]ecause the Ninth Circuit specifically
3 held in McQuillion that California's parole scheme creates a federally
4 protected liberty interest, and because Dannenberg did not address
5 this issue, the Court rejects Respondent's argument that there is no
6 protected liberty interest in parole for California inmates"); Machado
7 v. Kane, 2005 WL 3299885, at *2 (N.D.Cal. 2005) (discussing Dannenberg
8 and concluding that "[t]his Section 3041 requirement to grant parole
9 except under certain circumstances creates a cognizable liberty
10 interest in parole which is protected by the procedural safeguards of
11 the Due Process Clause for every eligible inmate") (citing Biggs, 334
12 F.3d at 913-915); Murillo v. Perez, 2005 WL 2592420, at *3, n.1
13 (C.D.Cal. 2005) (holding that Dannenberg did not undercut the law as
14 set forth in McQuillion); Saif'ullah v. Carey, 2005 WL 1555389, at *8
15 (E.D.Cal. 2005) (finding a liberty interest in parole in California
16 post-Dannenberg); Thompson v. Carey, 2005 WL 3287503, at *4 (E.D.Cal.
17 2005) (same); Devries v. Schwarzenegger, 2005 WL 2604203, at *3-4
18 (E.D.Cal. 2005) (same); but see Sass v. Cal. Bd. of Prison Terms, 376
19 F.Supp.2d 975, 982 (E.D.Cal. 2005) (holding that given the California
20 Supreme Court's decision in Dannenberg, there is no liberty interest
21 in parole in California).¹¹

22 Nevertheless, because parole proceedings are not part of the
23 criminal prosecution, the full panoply of rights due a defendant in a
24 criminal proceeding is not constitutionally mandated. Jancsek v.
25 Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). Instead,

26
27 ¹¹ The district judge who decided Sass may have later repudiated his
28 own decision. See Bair v. Folsom State Prison, 2005 WL 2219220, at *12
n.3 (E.D.Cal. 2005), report and recommendation adopted by, 2005 WL
3081634, at *1 (E.D.Cal. 2005).

1 the due process rights that flow from a liberty interest in parole are
2 limited: the prisoner must be provided with notice of the hearing, an
3 opportunity to be heard, and if parole is denied, a statement of the
4 reasons for the denial.¹² Greenholtz, 442 U.S. at 16; Jancsek, 833
5 F.2d at 1390 (citing Greenholtz, 442 U.S. at 16); see also Morrissey
6 v. Brewer, 408 U.S. 471, 481 (1972) (describing the procedural
7 protections due in the parole context). In addition, due process
8 requires that "some evidence" support the parole board's
9 determination, and that the evidence relied upon must possess "some
10 indicia of reliability." Biggs, 334 F.3d at 915; see McQuillion, 306
11 F.3d at 904; Jancsek, 833 F.2d at 1390 (adopting the "some evidence"
12 standard set forth by the Supreme Court in Superintendent v. Hill, 472
13 U.S. 445, 457 (1985));¹³ see also Caswell v. Calderon, 363 F.3d 832,
14 839 (9th Cir. 2004). The "some evidence" standard is satisfied if
15 there is reliable evidence in the record that could support the
16 conclusion reached. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994)

17
18 ¹² Petitioner does not allege that he was denied notice of the
19 parole hearing, an opportunity to be heard, or a statement of the reasons
20 for the denial of parole suitability. In fact, the record reflects that
he received each of these procedural protections.

21 ¹³ In Hill, the Supreme Court stated that

22 [i]n a variety of contexts, the Court has recognized that a
23 governmental decision resulting in the loss of an important
24 liberty interest violates due process if the decision is not
25 supported by any evidence. See, e.g., Douglas v. Buder, 412
26 U.S. 430, 432 (1973) (per curiam) (revocation of probation);
Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957)
(denial of admission to bar); United States ex rel. Vaitauer
v. Commissioner of Immigration, 273 U.S. 103, 106 (1927)
(deportation).

27 Hill, 472 U.S. at 455. The Supreme Court then held that "the requirements
28 of due process are satisfied if some evidence supports the decision by
the prison disciplinary board to revoke good time credits." Hill, 472
U.S. at 455.

1 (citing Hill, 472 U.S. at 455-456 and Cato v. Rushen, 824 F.2d 703,
2 705 (9th Cir. 1987)); see Cass v. Woodford, 2006 WL 1304953, at *9
3 (S.D.Cal. 2006) (explaining that "denial of parole must be based on 1)
4 some evidence that 2) bears some indicia of reliability."). Finally,
5 determining whether the "some evidence" standard was met does not
6 require examination of the entire record, independent assessment of
7 the credibility of witnesses, or the weighing of evidence. Hill, 472
8 U.S. at 455.

9 The BPT offered only one reason for its decision finding
10 petitioner unsuitable for parole: the egregiousness of petitioner's
11 commitment offense. On that basis, the BPT found that petitioner
12 would pose an unreasonable risk of danger if released. The BPT
13 characterized petitioner's offense as having been carried out "in an
14 especially cruel and callous manner" and "in a dispassionate and
15 calculated manner such as an execution style murder." It added that
16 "the victim was abused," and that "the motive for the crime is
17 inexplicable." [Petitioner's Ex. A at 113-114]. The Superior Court,
18 which offered the last reasoned decision on petitioner's claim,
19 concluded that the BPT's finding that his offense was "more aggravated
20 than the minimum necessary to sustain a conviction for second-degree
21 murder" was supported by some evidence.¹⁴ [Petitioner's Ex. G]. The

22
23 ¹⁴ Respondent argues that the BPT's decision rested upon another
24 ground: the opposition of the District Attorney and the Sheriff's
25 Department. That argument is flawed. First, the BPT did not purport to
26 deny parole on this ground; rather, the BPT simply noted their
27 opposition. [See Petitioner's Ex. A at 116]. Second, the Superior Court
28 did not decide that the opposition of these agencies amounted to some
evidence supporting the BPT's decision. Third, both the District Attorney
and the Sheriff's Department opposed parole based solely upon their view
of the gravity of the offense, so their opposition is merely cumulative
of the BPT's own determination regarding the callousness of the crime.
[See Petitioner's Ex. A at 72 & Respondent's Lodged Doc. 2, Ex. 3 (letter
from Captain Merriman of Sheriff's Department reiterating the facts of

1 Superior Court did not identify the evidence it considered in reaching
2 that conclusion. Its decision was at least the fifth time that the
3 BPT (or a state court reversing a BPT panel's grant of parole) had
4 denied parole based upon the unchanging facts of petitioner's
5 commitment offense.

6 In Biggs, the Ninth Circuit stated that although reliance on the
7 nature of a prisoner's offense may satisfy the "some evidence"
8 requirement, continued reliance on an unchanging factor such as the
9 circumstances of the offense could result in a due process violation
10 if the prisoner continually demonstrates exemplary behavior and
11 evidence of rehabilitation. Biggs, 334 F.3d at 916. Biggs was serving
12 a sentence of twenty-five years to life following a 1985 first degree
13 murder conviction. In what appears to have been Biggs's first parole
14 suitability hearing in 1999, the BPT found him unsuitable for parole
15 despite his record as a model prisoner. Biggs, 334 F.3d at 913. Biggs
16 claimed that the BPT's determination deprived him of due process
17 because it was not supported by any evidence. While the Ninth Circuit
18 rejected several of the reasons given by the BPT for finding Biggs

19 _____
20 the crime and stating that "[i]t is the opinion of this department that
21 parole of inmate Rosenkrantz is inappropriate and should be denied."),
22 Ex. A at 88-98 (Deputy District Attorney arguing that the offense "is a
23 cold blooded, execution style killing over a week's time of preparation
24 that shocks the conscience. And for that reason alone, as supported by
25 the Supreme Court, we would ask for a denial of parole.").

26 Finally, both the District Attorney and the Sheriff's Department
27 previously had not opposed granting petitioner parole. Nothing about
28 petitioner's case for release on parole changed for the worse between the
time when the District Attorney and the Sheriff's Department supported
release on parole and the time when they opposed it. To the contrary,
the facts of petitioner's crime have been fully developed for more than
a decade, while with each passing year additional evidence demonstrating
his suitability for parole has accumulated, including petitioner's
continued perfect performance in prison and additional favorable
psychological reports indicating that he would pose no danger to the
community if he were released on parole. In these circumstances, reliance
on the opposition of these agencies would be arbitrary.

1 unsuitable for parole, it upheld three: (1) Biggs's commitment offense
2 involved the murder of a witness; (2) the murder was carried out in a
3 manner exhibiting a callous disregard for the life and suffering of
4 another; and (3) Biggs could benefit from additional therapy. Biggs,
5 334 F.3d at 913. Nevertheless, the Ninth Circuit cautioned the BPT
6 about continued reliance on the gravity of the commitment offense and
7 Biggs's conduct prior to the commitment offense.

8 As in the present instance, the parole board's sole
9 supportable reliance on the gravity of the offense and
10 conduct prior to imprisonment to justify denial of parole
11 can be initially justified as fulfilling the requirements
12 set forth by state law. Over time, however, should Biggs
13 continue to demonstrate exemplary behavior and evidence of
14 rehabilitation, denying him a parole date simply because of
15 the nature of his offense would raise serious questions
16 involving his liberty interest.

17 Biggs, 334 F.3d at 916. The Ninth Circuit added that "[a] continued
18 reliance in the future on an unchanging factor, the circumstance of
19 the offense and conduct prior to imprisonment, runs contrary to the
20 rehabilitative goals espoused by the prison system and could result in
21 a due process violation." Biggs, 334 F.3d at 917.

22 One district court has explained the rationale underlying this
23 aspect of Biggs as follows:

24 Whether the facts of the crime of conviction, or other
25 unchanged criteria, affect the parole eligibility decision
26 can only be predicated on the "predictive value" of the
27 unchanged circumstance. Otherwise, if the unchanged
28 circumstance per se can be used to deny parole eligibility,

1 sentencing is taken out of the hands of the judge and
2 totally repositied in the hands of the BPT. That is, parole
3 eligibility could be indefinitely and forever delayed based
4 on the nature of the crime even though the sentence given
5 set forth the possibility of parole - a sentence given with
6 the facts of the crime fresh in the mind of the judge. While
7 it would not be a constitutional violation to forego parole
8 altogether for certain crimes, what the state cannot
9 constitutionally do is have a sham system where the judge
10 promises the possibility of parole, but because of the
11 nature of the crime, the BPT effectively deletes such from
12 the system. Nor can a parole system, where parole is
13 mandated to be determined on someone's future potential to
14 harm the community, constitutionally exist where despite 20
15 or more years of prison life which indicates the absence of
16 danger to the community in the future, the BPT commissioners
17 revulsion towards the crime itself, or some other unchanged
18 circumstance, constitutes the alpha and omega of the
19 decision. Nobody elected the BPT commissioners as sentencing
20 judges. Rather, in some realistic way, the facts of the
21 unchanged circumstance must indicate a present danger to the
22 community if released, and this can only be assessed not in
23 a vacuum, after four or five eligibility hearings, but
24 counterpoised against the backdrop of prison events.

25 Bair v. Folsom State Prison, 2005 WL 2219220, *12 n.3 (E.D.Cal. 2005),
26 report and recommendation adopted by, 2005 WL 3081634 (E.D.Cal. 2005).

27 In the circumstances of this case, the BPT's continued reliance
28 upon the nature of petitioner's crime to deny him parole in 2004

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1 violated due process. First, continued reliance upon the unchanging
2 facts of petitioner's crime makes a sham of California's parole system
3 and amounts to an arbitrary denial of petitioner's liberty interest.
4 Petitioner had been denied parole on six occasions prior to the
5 determination he now challenges. Continued reliance upon the
6 unchanging characterization of petitioner's offense amounts to
7 converting petitioner's sentence of seventeen years to life to a term
8 of life without the possibility of parole. As one court has put it:

9 The court asks rhetorically - what is it about the
10 circumstances of petitioner's crime or motivation which are
11 going to change? The answer is nothing. The circumstances of
12 the crimes will always be what they were, and petitioner's
13 motive for committing them will always be trivial.
14 Petitioner has no hope for ever obtaining parole except
15 perhaps that a panel in the future will arbitrarily hold
16 that the circumstances were not that serious or the motive
17 was more than trivial. Given that no one seriously contends
18 lack of seriousness or lack of triviality at the present
19 time, the potential for parole in this case is remote to the
20 point of non-existence. Petitioner's liberty interest should
21 not be determined by such an arbitrary, remote possibility.

22 Irons v. Warden of California State Prison--Solano, 358 F.Supp.2d 936,
23 947 (E.D.Cal. 2005), appeal docketed, No. 05-15275 (9th Cir. Feb. 17,
24 2005).

25 The arbitrariness of the decision in petitioner's case is
26 highlighted by the flip-flopping characterizations of petitioner's
27 crime by different BPT panels and the unexplained reversals in the
28 positions of the District Attorney and the Sheriff's Department

1 regarding petitioner's crime and its relation to his suitability for
2 parole. Different hearing panels have used different parts of the
3 regulations to describe petitioner's crime. Some of these
4 characterizations are inaccurate and lack any support in the record.
5 For example, there is no dispute that petitioner was extremely
6 emotionally upset by Redman's attack upon him at the beach house and
7 the subsequent revelation of petitioner's homosexuality to
8 petitioner's father. As the California courts have concluded, an
9 "inexplicable motive" is "one that is unexplained or unintelligible,
10 as where the commitment offense does not appear to be related to the
11 conduct of the victim and has no other discernable purpose." Scott,
12 119 Cal.App.4th at 892-893. To call petitioner's crime
13 "inexplicable," as the BPT has done [see Petitioner's Ex. A at 113-
14 119], contradicts all of the evidence in the record. In fact, as the
15 first panel granting parole concluded, and as every psychological
16 examination performed on petitioner has confirmed, petitioner's crime
17 was the result of significant emotional stress in his life, a factor
18 that weighs in favor of parole suitability. 15 Cal. Code Regs. §
19 2402(d)(4); see Scott, 133 Cal.App.4th at 595-596 (finding that the
20 Governor erred by failing to consider in petitioner's favor the
21 undisputed evidence that the inmate committed his offense while under
22 emotional stress). Similarly, the statement that the crime was
23 "especially callous" does not fit within the regulations, which
24 provide that one factor to consider is whether "the offense was
25 carried out in a manner which demonstrates an exceptionally callous
26 disregard for human suffering." 15 Cal. Code Regs. §2402(c)(1)(D).
27 According to California appellate courts, this provision contemplates
28 that the victim was made to suffer in some exceptional way. See Scott,

1 119 Cal.App.4th at 892 (holding that a determination that the crime
2 had been carried out with "exceptional disregard for human suffering"
3 meant that it was perpetrated in an especially cruel manner with
4 disregard for human suffering and required more than the simple
5 cruelty and callousness necessary to find that a defendant killed with
6 malice); In re Smith, 114 Cal.App.4th 343, 366-367 (2003) (same).¹⁵
7 There is no evidence in the record supporting such a conclusion.
8 Likewise, the statement that the victim was "abused" because he was
9 shot ten times does not fall within the definition contained in the
10 regulations, which provide that one relevant factor is whether "the
11 victim was abused, defiled or mutilated during or after the offense."
12

13
14 ¹⁵ In Smith, the court reversed a parole denial which had been based,
15 in part, on a determination that the inmate's crime had been carried out
16 with "exceptional disregard for human suffering." The appellate court
17 observed that since second degree murder requires express or implied
18 malice, all second degree murders by definition involve some degree of
19 cruelty and callousness. Since a conviction for second degree murder does
20 not automatically make a person unsuitable for parole, a determination
21 that the crime was cruel or callous must mean that it was perpetrated in
22 an especially cruel manner or with exceptionally callous disregard for
23 suffering. Smith, 114 Cal.App.4th at 366-367. In Smith, the defendant
24 became enraged at his wife when she told him she no longer wanted to see
25 him. He grabbed a gun and shot her three times in the head. The state
26 court rejected the suggestion that the facts provided supported a finding
27 that defendant had acted with especially callous disregard for the
28 victim's suffering. Smith, 114 Cal.App.4th at 366-367.

21 In Scott, the court reached the same conclusion. It determined that
22 the evidence did not support a finding that the crime was carried out
23 with exceptionally callous disregard for human suffering. The defendant
24 in Scott had gone looking for his wife and found her at her lover's house
25 affectionately hugging him. When the wife's lover confronted Scott, Scott
26 warned him that he would shoot. Scott then fired two or three rounds,
27 which struck the victim in the head and in the thigh. Scott immediately
28 left the scene. Scott, 119 Cal.App.4th at 878. The appellate court
concluded that there was no evidence that Scott "tormented, terrorized,
or injured [his victim] before deciding to shoot [him], or that he
gratuitously increased or unnecessarily prolonged [his] pain and
suffering.... Was the crime callous? Yes. However, are the facts of the
crime some evidence that [he] acted with exceptionally callous disregard
for [the victim's] suffering; or do the facts distinguish this crime from
other second degree murders as exceptionally callous? No." Scott, 119
Cal.App.4th at 892 (citation omitted).

1 15 Cal.Code Regs. § 2042(c)(1)(C). Cf. Maurer v. Calderon, 1997 WL
2 446229, *2 (N.D.Cal. 1997) (finding that the record contained some
3 evidence supporting the BPT's finding that the victim had been
4 "abused, defiled or mutilated" during the offense, where the victim
5 was stabbed in the abdomen and the victim's face was slashed with a
6 hunting knife during an attempted robbery but before the victim was
7 fatally shot). Taken together, the shifting characterizations and
8 conflicting decisions of the BPT demonstrate that its determination
9 that petitioner's offense was exceptionally callous, and therefore
10 indicates that petitioner is too dangerous to release on parole, was
11 arbitrary and based entirely on the subjective lay opinions of the
12 panel members.

13 Second, the circumstances of petitioner's crime do not amount to
14 some evidence supporting the conclusion that petitioner poses an
15 unreasonable risk of danger if released. As discussed, "[i]n the
16 parole context, the requirements of due process are met if some
17 evidence supports the decision." Biggs, 334 F.3d at 915. "Some
18 evidence," however, does not mean literally "any" evidence. If it
19 did, the protection afforded by due process would be meaningless. See
20 Gerald L. Neuman, The Constitutional Requirement of "Some Evidence",
21 25 San Diego L.Rev. 631, 663-664 (1988) (noting that "[e]vidence that
22 the respondent was alive at the time in question is usually relevant
23 to any charge against her. The [due process] protection of the 'some
24 evidence' requirement demands more than that - less than legal
25 'sufficiency' of evidence, but more than a trivial charade."). In
26 addition, the evidence underlying the decision must possess some
27 indicia of reliability." Biggs, 334 F.3d at 914 (internal quotations
28 omitted); Caswell, 363 F.3d at 839; see Hill, 472 U.S. at 455-456.

1 Evidence that lacks any real probative value cannot constitute "some
2 evidence." See Cato, 924 F.2d at 705 (holding that a hearsay statement
3 attributed to an inmate whose polygraph examination yielded
4 inconclusive results was "not enough evidence to meet the Hill
5 standard."). Otherwise, the requirement of "some evidence" could be
6 satisfied by baseless speculation, superstition, or stereotyping.
7 That, too, would reduce the requirement of "some evidence" to a sham
8 or a mockery.

9 As it was required to do, the BPT considered whether petitioner
10 was suitable for parole - that is, whether he presented an
11 unreasonable risk of danger to society if released. See Cal.Penal
12 Code §3041(b); 15 Cal.Code Regs. § 2402. It decided that petitioner
13 posed an unreasonable risk of danger (and, therefore, was unsuitable
14 for parole) because his crime was especially heinous.¹⁶ While relying
15 upon the nature of petitioner's crime as an indicator of his
16 dangerousness may be reasonable for some period of time, in this case

17 _____
18 ¹⁶ The facts of petitioner's crime also are relevant to the BPT's
19 setting of a parole release date. California law provides that

20 [t]he release date shall be set in a manner that will provide
21 uniform terms for offenses of similar gravity and magnitude in
22 respect to their threat to the public, and that will comply
23 with the sentencing rules that the Judicial Council may issue
24 and any sentencing information relevant to the setting of
25 parole release dates. The board shall establish criteria for
26 the setting of parole release dates and in doing so shall
27 consider the number of victims of the crime for which the
28 inmate was sentenced and other factors in mitigation or
29 aggravation of the crime.

30 Cal.Penal Code § 3041(a). Thus, the circumstances of the commitment
31 offense are relevant to two determinations: (a) whether a prisoner is
32 suitable for parole - i.e., whether he or she presents an unreasonable
33 risk of danger to society if released, and (b) the appropriate length of
34 incarceration required to fairly and uniformly punish him or her. As
35 evidenced by the parole dates already given to petitioner (March 30, 2000
36 and March 30, 2001), the BPT has determined that the severity of
37 petitioner's offense did not warrant punishment of more than 16 years.

1 continued reliance on such unchanging circumstances - after nearly two
2 decades of incarceration and half a dozen parole suitability hearings
3 - violates due process because petitioner's commitment offense has
4 become such an unreliable predictor of his present and future
5 dangerousness that it does not satisfy the "some evidence" standard.
6 After nearly twenty years of rehabilitation, the ability to predict a
7 prisoner's future dangerousness based simply on the circumstances of
8 his or her crime is nil. See Irons, 358 F.Supp.2d at 947 n. 2 ("To a
9 point, it is true, the circumstances of the crime and motivation for
10 it may indicate a petitioner's instability, cruelty, impulsiveness,
11 violent tendencies and the like. However, after fifteen or so years in
12 the caldron of prison life, not exactly an ideal therapeutic
13 environment to say the least, and after repeated demonstrations that
14 despite the recognized hardships of prison, this petitioner does not
15 possess those attributes, the predictive ability of the circumstances
16 of the crime is near zero."). Even California courts have said as
17 much. Scott, 133 Cal.App.4th at 595 ("The commitment offense can
18 negate suitability only if circumstances of the crime reliably
19 established by evidence in the record rationally indicate that the
20 offender will present an unreasonable public safety risk if released
21 from prison. Yet, the predictive value of the commitment offense may
22 be very questionable after a long period of time.").

23 The probative value of petitioner's commitment offense as a
24 predictor of his present dangerousness is further diminished by
25 petitioner's age at the time of the offense. Petitioner turned 18 on
26 May 22, 1985 [see Petitioner's Ex. E at 1 (noting petitioner's birth
27 date as 5-22-67)], and committed his offense one month later. While
28

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1 petitioner was not legally a minor, he was very close to being one.¹⁷
2 As the Supreme Court recently recognized, the predictive value of
3 conduct of such a young person is less than that of an adult.

4 The susceptibility of juveniles to immature and
5 irresponsible behavior means "their irresponsible conduct is
6 not as morally reprehensible as that of an adult." Thompson
7 [v. Oklahoma], 487 U.S. 815, 835 (1988)] (plurality opinion).
8 Their own vulnerability and comparative lack of control over
9 their immediate surroundings mean juveniles have a greater
10 claim than adults to be forgiven for failing to escape
11 negative influences in their whole environment. See Stanford
12 [v. Kentucky], 492 U.S. 361, 395 (1989)] (Brennan, J.,
13 dissenting). The reality that juveniles still struggle to
14 define their identity means it is less supportable to
15 conclude that even a heinous crime committed by a juvenile
16 is evidence of irretrievably depraved character. From a
17 moral standpoint it would be misguided to equate the
18 failings of a minor with those of an adult, for a greater
19 possibility exists that a minor's character deficiencies
20 will be reformed. Indeed, "[t]he relevance of youth as a
21 mitigating factor derives from the fact that the signature
22 qualities of youth are transient; as individuals mature, the
23 impetuosity and recklessness that may dominate in younger

24
25 ¹⁷ Petitioner was an adolescent at the time he committed the
26 offense. See Cornelia Pechman, Linda Levine, Sandra Loughlin & Frances
27 Leslie, Impulsive and Self-Conscious: Adolescents' Vulnerability to
28 Advertising and Promotion, 24 J. Pub. Policy & Marketing 1 (Fall, 2005)
(explaining that the conventional view is that "adolescence is roughly
synonymous with teenager, or ages 13-19," but that "many scholars argue
that adolescence begins at approximately age 10 and does not end until
early 20s.") (citation omitted).

1 years can subside." Johnson v. Texas, 509 U.S. 350, 368
2 (1993)).
3 Roper v. Simmons, 543 U.S. 551, 561-562 (2005); see also Thompson v.
4 Oklahoma, 487 U.S. 815, 835 (1998) (Stevens, J.) (plurality opinion)
5 ("[L]ess culpability should attach to a crime committed by a juvenile
6 than to a comparable crime committed by an adult. The basis of this
7 conclusion is too obvious to require extensive explanation.
8 Inexperience, less intelligence and less education make a teenager
9 less able to evaluate the consequences of his or her conduct while at
10 the same time he or she is more apt to be motivated by mere emotion or
11 peer pressure than as an adult."); Erica Beecher-Monas & Edgar Garcia-
12 Rill, Danger at The Edge of Chaos: Predicting Violent Behavior in a Post-
13 Daubert World, 24 Cardozo L.Rev. 1845, 1898 (2003) ("The decrease in violence
14 and criminal activity with age is a well-established principle of
15 criminology.").

16 Petitioner's case is exactly what Biggs envisioned when it stated
17 that repeated refusals to grant a parole release date to an inmate
18 with an exemplary post-conviction record may violate the prisoner's
19 due process rights. Biggs, 334 F.3d at 919. The record in this case
20 is replete with evidence of petitioner's remorse and rehabilitation,
21 including glowingly positive psychological reports, extensive self-
22 improvement through completion of educational and vocational programs,
23 as well as therapy, valued service in promoting the penological goals
24 of the prison where he is confined, and nearly two decades of
25 disciplinary-free incarceration. The evidence of petitioner's
26 outstanding performance while incarcerated is particularly important.
27 As the Supreme Court has recognized, "[t]he behavior of an inmate
28 during confinement is critical in the sense that it reflects the

1 degree to which the inmate is prepared to adjust to parole release."
2 Greenholtz, 442 U.S. at 15. Further, as detailed above, every
3 psychologist and correctional counselor who has evaluated petitioner
4 has concluded that petitioner would pose no significant risk of danger
5 if released. [Petitioner's Exs. E & F]. Regardless of whether the BPT
6 ever was entitled to rely upon the commitment offense to find that
7 petitioner posed an unreasonable risk of danger and was unsuitable for
8 parole, in the exceptional circumstances presented by this case, the
9 BPT's continued reliance on the commitment offense violates due
10 process because it resulted in an arbitrary decision and because the
11 facts surrounding the offense do not now constitute "some evidence"
12 possessing "some indicia of reliability" that petitioner pose a
13 danger to the community. See Hill, 472 U.S. at 455; Biggs, 334 F.3d
14 at 917; Irons, 358 F.Supp.2d at 947; Masoner v. State, 2004 WL
15 1080177, at *1-2 (C.D.Cal. 2004) ("Although the gravity of the
16 commitment offense and other pre-conviction factors alone may be
17 sufficient to justify the denial of a parole date at a prisoner's
18 initial hearing, subsequent BPT decisions to deny a parole date must
19 be supported by some post-conviction evidence that the release of an
20 inmate is against the interest of public safety. Masoner's successful
21 rehabilitation and spotless prison record, in combination with his
22 having served 21 years and the type of crime usually associated with
23 such a sentence under the Universal Terms Matrix, indicate that there
24 is no legitimate post-conviction justification for the BPT's repeated
25 refusal to grant him a parole date.").

26 Because there is no reliable evidence supporting the BPT's
27 conclusion that petitioner is unsuitable for parole, that
28 determination violates due process. See Hill, 472 U.S. at 455. The

1 state court's determination to the contrary was based upon an
2 unreasonable determination of the facts in light of the evidence
3 presented during the parole hearing, and that determination amounted
4 to an unreasonable application of clearly established Supreme Court
5 precedent. See Hill, 472 U.S. at 455; Taylor v. Maddox, 366 F.3d 992,
6 999-1000 (9th Cir.), cert. denied, 543 U.S. 1038 (2004). Accordingly,
7 petitioner is entitled to relief.¹⁸ See McQuillion, 306 F.3d at 912
8 (finding that petitioner was entitled to relief where none of the four
9 grounds for rescission of petitioner's parole release date was supported
10 by "some evidence," and therefore the decision violated due process);
11 Martin v. Marshall, ___ F.Supp.2d ___, 2006 WL 1344584, *8 (N.D.Cal.
12 2006) (granting habeas relief, noting that the petitioner had served
13 23 years of his 20 year to life sentence and had "demonstrate[d]
14 exemplary behavior and evidence of rehabilitation" for a significant
15 period of time, and holding that "the sole reliance on petitioner's
16 commitment offense in denying him parole impinges on petitioner's
17 constitutional liberty interest in parole."); Irons, 358 F.Supp.2d at
18 947-951 (granting habeas relief where the BPT improperly relied upon
19 the unchanging circumstances of the commitment offense in finding
20 petitioner unsuitable for parole in his fifth parole suitability
21 hearing, and also asserted that petitioner needed more therapy, a
22 conclusion that lacked any support in the record); Saif'ullah, 2005 WL

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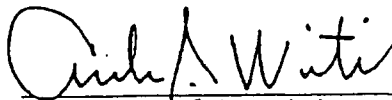
¹⁸ Although it is not clear whether he is doing so, to the extent that petitioner alleges that he was denied his right to a parole release date under section 3041(a) or was denied a parole release date that was comparable to parole release dates granted to inmates convicted of similar crimes, his claim is foreclosed by Dannenberg and also fails to raise a cognizable federal issue. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Further, since petitioner is entitled to relief because the BPT's decision violates due process, the Court need not address petitioner's other claims.

1 1555389 at *13-16 (granting habeas relief where the record contained
2 no evidence supporting the BPT's decision that petitioner was a danger
3 to society and unsuitable for parole based upon (a) his commitment
4 offense, (b) his prior criminal history, and (c) a rules violation
5 which resulted when, based upon his religious beliefs, petitioner
6 refused to cut his hair).

7 **Conclusion**

8 For the foregoing reasons, the petition should be granted.
9 Because petitioner's parole date has twice been determined under
10 California law, and because both of those dates (March 30, 2000 and
11 March 30, 2001) have long since passed, respondent should be directed
12 to release petitioner on parole within thirty (30) days of the date of
13 entry of judgment. McQuillion v. Duncan, 342 F.3d 1012, 1015-1016
14 (9th Cir. 2003) (affirming grant of relief on appeal after remand, and
15 explaining that proper relief is immediate release rather than remand
16 for further parole proceedings where no evidence in the record
17 supported the BPT's determination that the petitioner was not suitable
18 for parole); Saif'ullah, 2005 WL 1555389 at *16 ("In the absence of
19 any evidence in the record supporting the Board's decision, remanding
20 the case for a new hearing is futile, and the appropriate remedy is to
21 grant the release of the petitioner.").

22
23 DATED: 6.23.2006

24 

25 Andrew J. Wistrich
26 United States Magistrate Judge
27
28

EXHIBIT 52

Orange County Superior Court Denial

FILEDSUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

FEB 23 2007

ALAN SLATER, Clerk of the Court

BY: L. MA, DEPUTY

SUPERIOR COURT OF CALIFORNIA

IN AND FOR ORANGE COUNTY

In the matter of:

MARK TITCH,
Petitioner, Pro Se

v.

ROBERT J. HERNANDEZ,
Warden, RJDCF

and

JAMES DAVIS,
Chairperson, BPHCase No. M-11226

PETITION FOR WRIT OF HABEAS CORPUS

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

APR 16 2007

ALAN SLATER, Clerk of the Court

BY: APR TOWNS DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

In re MARK WAYNE TITCH,)	Orange County Superior Court
)	Case Number: M-11226
Petitioner,)	(C-37693)
)	
)	ORDER DENYING
ON HABEAS CORPUS)	HABEAS CORPUS

TO THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL AND PETITIONER:
HAVING REVIEWED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS
CORPUS AND EXHIBITS, THE COURT MAKES THE FOLLOWING ORDER:

I.

Petitioner is serving an indeterminate term of life imprisonment with the possibility of parole following his 1978 guilty plea and conviction on two counts of first degree murder [Pen. Code, § 187], five counts of armed first degree robbery [Pen. Code, § 211/§ 12022.5], three counts of second degree burglary [Pen. Code, § 459], and one count of armed kidnapping for robbery [Pen. Code, § 209/§ 12022.5]. Petitioner is also currently serving a concurrent term of life imprisonment with the possibility of parole stemming from a conviction for armed assault with a deadly weapon on a peace officer [Pen. Code, § 245/§ 12022.5] sustained in the San Diego County Superior Court.

The Board of Parole Hearings deemed petitioner unsuitable for parole following an July 19, 2006 subsequent parole consideration hearing. The Board specifically found that:

- 11.

- A. The Board violated petitioner's right to due process by failing to adhere to administrative regulations applicable to petitioner's parole suitability hearing.
- B. The Board's decision is without evidentiary support and lacks a rational nexus between those factors of unsuitability found by the Board and petitioner's current parole risk.
- C. The Board's continued reliance on the unchanging circumstances of his commitment offense to find petitioner unsuitable for parole while ignoring ample evidence supportive of parole improperly converts petitioner's sentence to life imprisonment without the possibility of parole.

iii.

The petition does not set forth a meritorious basis for relief on habeas corpus. To the extent petitioner faults the Board for evaluating his suitability for release on parole using

1 criteria set forth in § 2281 of Title 15 of the California Code of Regulations rather than
2 criteria applicable to ISL inmates, such contention is without merit. The parole suitability
3 criteria applicable to inmates convicted of committing murder prior to July 8, 1978, are set
4 forth in Cal. Code Regs., tit. 15, §§ 2281. (See, *Board of Prison Terms v. Superior Court*
5 (2005) 130 Cal.App.4th 1212, 1232, fn. 5; Cal. Code of Regs., tit. 15, § 2292(b).)
6

7 Equally without merit is petitioner's legal challenge to the sufficiency of the evidence
8 relied upon by the Board to find him unsuitable for parole. The determination made by the
9 Board concerning petitioner's parole suitability is adequately supported by evidence in the
10 record. In reaching its decision, the Board rationally relied upon the circumstances of the
11 commitment offenses. (See, Pen. Code, § 3041(b); Cal. Code of Regs., tit. 15, § 2281(b)
12 and (c)(1)(A)(B)(D)(E).)
13

14 The convictions stem from a violent crime spree carried out by petitioner between
15 November 1976 and January 1977. On November 19 and December 14, 1976, petitioner
16 awakened unsuspecting victims from their sleep in the middle of the night during two
17 separate incidents, threatened them with a firearm, and robbed them of money and
18 personal belongings. On December 18, 1976, petitioner, along with a crime partner,
19 perpetrated the same crime against another helpless couple in the same fashion with the
20 same result.
21

22 On December 21, 1976, petitioner robbed a restaurant with a firearm and took \$60.
23 On December 27, 1976, January 16, and January 19, 1977, petitioner burglarized three
24 separate homes and stole a pair of automobiles.
25

26 On December 27, 1976, petitioner and a crime partner robbed a liquor store at
27 gunpoint. While leaving the scene, petitioner was confronted by a peace officer. Petitioner
28

1 fired upon the officer with his firearm striking him five times and causing severe injuries.

2 This offense is the basis for the conviction sustained by petitioner in San Diego County.

3 On January 27, 1977, a motorcycle rider discovered the dead body of a 21 year old
4 woman clutching a rosary in a vacant filed in the City of Orange. The unarmed victim had
5 two gunshot wounds to the mouth area and one wound to the shoulder that were inflicted by
6 the petitioner.
7

8 On January 29, 1977, petitioner and a crime partner followed their last victim home
9 from work. As the unsuspecting victim was attempting to enter his home, he was fatally
10 shot several times by petitioner's crime partner with a .22 caliber rifle. The victim's wife was
11 also shot multiple times as she opened the door. Petitioner's crime partner shot her again
12 with a shotgun after running out of ammunition for the rifle. The couple's daughter was
13 fatally shot multiple times during this incident as well.
14

15 No abuse of discretion is perceived in this instance. Petitioner engaged in a violent
16 crime spree targeting unsuspecting and seemingly random victims for no apparent reason
17 other than to terrorize, harm, and/or kill them and deprive them of their personal belongings.
18 The Board's characterization of the offenses as cruel and callous is warranted as petitioner
19 displayed no concern for his many victims some of which were left to die in a desolate field
20 or on the doorstep to their own home.
21

22 Evidence in the record supports the Board's finding that petitioner has an escalating
23 pattern of criminal conduct and violence. The record reveals that between 1972 and 1976,
24 petitioner was arrested and/or sustained juvenile adjudications for truancy, malicious
25 mischief, escape, threat to assault, burglary, armed robbery, and assault with intent to
26 commit murder. Notwithstanding petitioner's claim that some of the misconduct did not
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1 involve violence or result in formal adjudications, this persistent anti-social behavior is
2 rationally related to causative factors leading up to the commitment offenses and justifies
3 the Board's ongoing concern that petitioner may not behave differently if released on parole.
4 (See, Cal. Code of Regs., tit. 15, § 2281(b).)

5
6 Evidence in the record also supports the Board's reliance on petitioner's record of
7 institutional misconduct. Prior to 1986, petitioner was disciplined five separate times for
8 major institutional misconduct involving violence and the illegal manufacture of alcohol.
9 Though the serious misconduct is some 20 years removed from the issue presently under
10 review, it is relevant to petitioner's overall pattern of disregard for the law and apparent
11 contempt for authority and justifies the Board's lingering concern over petitioner's ability to
12 be safely released into the community on parole. (See, Cal. Code of Regs., tit. 15, §
13 2281(b) and (c)(6).)

14
15 The Board's determination that petitioner's most recent psychological assessment is
16 not fully supportive of his release on parole is supported by some evidence in the record.
17 While the report does state that petitioner has only a history of antisocial personality
18 disorder and would pose a less than average risk of violent behavior if released on parole,
19 the psychiatrist's assessment is guarded at best. In his assessment of petitioner's potential
20 danger, Dr. John Preston opined petitioner has begun to take those steps necessary which
21 with the passage of time will point toward a diminishing propensity toward criminal behavior.
22 Dr. Preston expressed the view that so long as petitioner continues to program positively
23 and upgrade his parole plans and level of support from the community, he will move towards
24 a point in time in which the risk inherent in his release on parole may be acceptable. The
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1 Board was well within its authority to interpret Dr. Preston's evaluation as not being
2 completely support of petitioner's release on parole at this time.

3 The Board finally relied on opposition to parole expressed by both the Anaheim
4 Police Department and the Orange County District Attorney's Office. No abuse of discretion
5 is evident as the Board is statutorily required to consider these views when considering the
6 parole suitability of a particular inmate. (See, Pen. Code, § 3042(a), § 3046(c).)

7
8 The Board acknowledged petitioner's favorable accomplishments while in prison
9 which include a recent discipline free record, extensive educational and vocational
10 programming, and realistic parole plans. The Board nevertheless found that the positive
11 aspects of petitioner's prison record do not outweigh those circumstances pointing to
12 unsuitability for release on parole at this time. Petitioner does not satisfy his burden of
13 demonstrating arbitrary and capricious action on the part of the Board of Parole Hearings.
14 Due consideration of petitioner's eligibility for parole was given and a proper evidentiary
15 foundation exists for the Board's determination finding petitioner currently unsuitable for
16 release on parole.
17

18
19 The Board has very broad discretion to identify and weigh the factors relevant to
20 predicting by subjective analysis whether an inmate will be able to live in society without
21 committing additional antisocial acts. (*In re Fuentes* (2005) 135 Cal.App.4th 152, 160.) In
22 reviewing a parole suitability determination made by the Board of Parole Hearings, a court
23 views the record in the light most favorable to that determination. (See, *In re Morrell* (2002)
24 102 Cal.App.4th 280, 301.)
25

26 Courts may review the factual basis of a decision of the Board denying parole in
27 order to ensure that the decision complies with due process of law. However, courts may
28

1 only inquire whether some evidence in the record before the Board supports the decision to
2 deny parole, based upon the factors specified by statute and regulation. (*In re Rosenkrantz*
3 (2002) 29 Cal.4th 616, 658.)

4 The precise manner in which the specified factors relevant to parole suitability are
5 considered and balanced lies within the discretion of the Board of Parole Hearings, but the
6 decision must reflect an individualized consideration of the specified criteria and cannot be
7 arbitrary or capricious. It is irrelevant that a court might determine that the evidence in the
8 record tending to establish suitability for parole far outweighs evidence demonstrating
9 unsuitability for parole. As long as the decision reflects due consideration of the specified
10 factors as applied to the individual prisoner in accordance with applicable legal standards,
11 the court's review is limited to ascertaining whether there is some evidence in the record
12 that supports the decision. (*In re Rosenkrantz, supra*, 29 Cal.4th at 677.)

13 Petitioner's remaining contention is likewise without merit. In evaluating an individual
14 inmate's parole suitability, the Board of Parole Hearings is not precluded from relying on the
15 unchanging circumstances of the commitment offense.

16 The panel or board shall set a release date unless it determines that the gravity of the
17 current convicted offense or offenses, is such that consideration of the public safety requires
18 a lengthier period of incarceration for this individual, and that a parole date, therefore,
19 cannot be fixed at this meeting. (Pen. Code, § 3041(b).) The Board of Parole Hearings
20 "may protect public safety in each discrete case by considering the dangerous implications
21 of a life-maximum prisoner's crime individually. While the Board must point to factors
22 beyond the minimum elements of the crime for which the inmate was committed, it need
23 engage in no further comparative analysis before concluding that the particular facts of the
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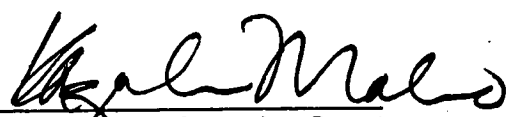
1 offense make it unsafe, at that time, to fix a date for the prisoner's release." (*In re*
2 *Dannenberg* (2005) 34 Cal.4th 1061, 1071.)

3
4 IV.

5 No prima facie case for relief is established. An order to show cause will issue only if
6 petitioner has established a prima facie case for relief on habeas corpus. (*People v.*
7 *Romero* (1994) 8 Cal.4th 728, 737; *In re Clark* (1993) 5 Cal.4th 750, 769, fn. 9.)

8 The petition for writ of habeas corpus is DENIED.
9

10
11
12 Dated: 4-16-07

13 
14 Judge of the Superior Court
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MINUTE ORDER

Case Number M-11226 X A

People Vs Titch, Mark

Report Request Criteria

1. Docket Date Range : Date filter
2. Sequence Number Range : Sequence filter
3. Docket Category : Category filter

<u>Docket Dt</u>	<u>Seq</u>	<u>Text</u>
4/16/2007	1	Hearing held on 04/16/2007 at 09:00 AM in Department C5 for Chambers Work.
	2	Officiating Judge: Kazuharu Makino, Judge
	3	Clerk: L. Torres
	4	No Court Reporter present at proceedings.
	5	No appearances.
	6	Order denying Writ of Habeas Corpus filed.
	7	Petition for Writ of Habeas Corpus is denied for the reasons stated in the order denying writ filed 02/23/2007.
	8	As ordered, the clerk this date has mailed a copy of this minute order to the Petitioner at MARK TITCH CDC #B-89549 F1-04-227L R.J. DONOVAN CORRECTIONAL FACILITY P.O. BOX 799001 SAN DIEGO, CA 92179-9001.
	9	The clerk this date has forwarded a copy of this minute order to Orange County District Attorney's Office.

- 9 -

EXHIBIT 53

California Appellate Court Denial

1 Mark Titch
B-89549, Fl-04-227
2 P.O. Box 799001
San Diego, Ca 92179-9001
3 Petitioner, Pro Se

COURT OF APPEAL-4TH DIST DIV 3

FILED

MAY 7 - 2007

CALIFORNIA COURT OF APPEAL

FOURTH APPELLATE DISTRICT

Deputy Clerk _____

9 In re MARK TITCH

11 on

12 Habeas Corpus

Case No. _____

GO38608

PETITION FOR WRIT OF HABEAS CORPUS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

COURT OF APPEAL-4TH DIST DIV 3
FILED

DIVISION THREE

JUN 28 2007

In re MARK WAYNE TITCH

on Habeas Corpus.

G038608

Deputy Clerk _____

(Super. Ct. No. M11226)

O R D E R

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

RYLAARSDAM, J.

RYLAARSDAM, ACTING P. J.

* Before Rylaarsdam, Acting P. J., Fybel, J., and Ikola, J.

 **COPY**

EXHIBIT 54

California Supreme Court Denial

Name Mark Titch
Address B-89549, Fl-04-227L
P.O. Box 799001
San Diego, Ca. 92179-9001
CDC or ID Number B-89549

**SUPREME COURT
FILED**

AUG - 6 2007

Frederick K. Ohlrich Clerk

CALIFORNIA SUPREME COURT
(Court)

Deputy

PETITION FOR WRIT OF HABEAS CORPUS

S155126

No. _____

(To be supplied by the Clerk of the Court)

MARK TITCH

Petitioner, Pro Se

vs.

ROBERT J. HERNANDEZ, Warden RJDCF

Respondent(s), et.al.

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

S155126

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re MARK TITCH on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

FEB 20 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice